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# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1947

## No. 105

JACOB LICHTER AND JENNIE L. LICHTER, INDIVIDUALLY AND AS CO-PARTNERS DOING BUSINESS AS SOUTHERN FIREPROOFING COMPANY, A CO-PARTNERSHIP, PETITIONERS,

*vs.*

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 27, 1947.

CERTIORARI GRANTED JUNE 16, 1947.

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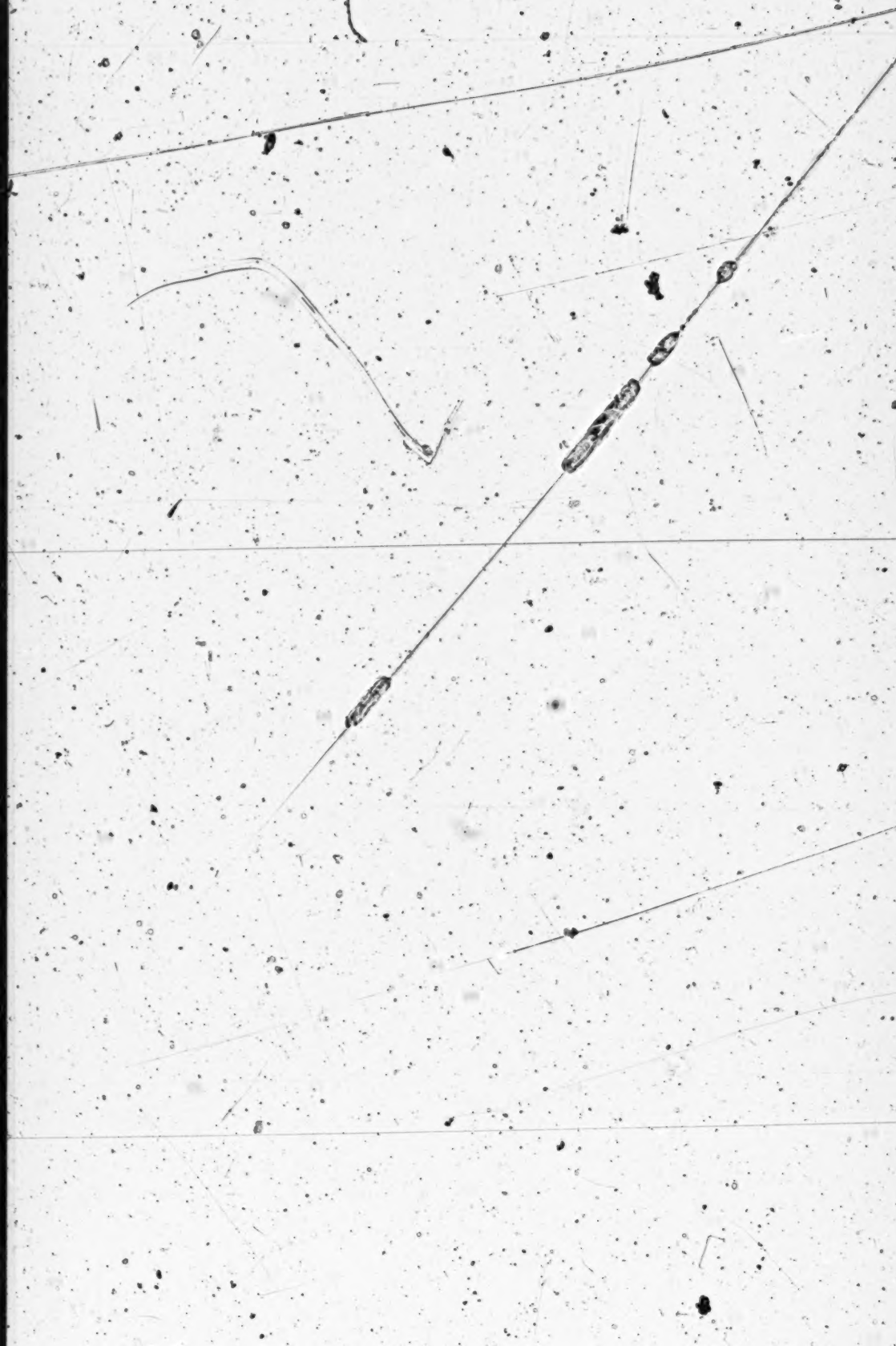

# UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

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**Civil No. 1176**

**Cincinnati**

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UNITED STATES OF AMERICA,

*Plaintiff,*

v.

JACOB LICHTER, JENNIE L. LICHTER, individually and as co-partners doing business as SOUTHERN FIREPROOFING COMPANY, a co-partnership,

*Defendants.*

---

## COMPLAINT

(Filed May 9, 1945)

The United States of America, by Byron B. Harlan, United States Attorney for the Southern District of Ohio, says that:

1. Jacob Lichter and Jennie L. Lichter, defendants, reside in Cincinnati, Hamilton County, Ohio, and do business there under the firm name and style of Southern Fireproofing Company, a co-partnership.

2. This action is brought pursuant to Section 403 of the Renegotiation Act.

3. After notice to defendants proceedings for the renegotiation of defendants' subcontracts were had and conducted by representatives of the Secretary of War. Thereafter and on the 20th day of October, 1944, the Under Secretary of War, acting under and by virtue of the Renegotiation Act and pursuant to authority delegated to him duly determined that of the profits realized by defendants during the calendar year 1942 on their subcontracts subject to renegotiation Seventy Thousand Dollars ($70,000.00) thereof were excessive profits. A full, and true and correct copy of the order and determination of the Under Secretary of War is attached hereto as Exhibit A.

4. The tax credit to which defendants are entitled under Section 3806 of the Internal Revenue Code is in the amount of Forty-two Thousand Nine Hundred Eighty Dollars and Sixty-One Cents ($42,980.61).

5. On the 20th day of October, 1944, the Under Secretary of War directed defendants to repay on or before November 6, 1944, to the Treasurer of the United States the said excessive profits less the appropriate tax credit.

6. Defendants have not petitioned the Tax Court of the United States for a redetermination of the order made by the Under Secretary of War as provided in Section 403(e) (1 and 2) of the Renegotiation Act and the period for filing such a petition has expired.

7. Defendants have not paid to the United States and the United States has not withheld or by any other method eliminated said excessive profits in the amount of Seventy Thousand Dollars ($70,000.00) less the tax credit aforesaid nor any part thereof. Said amount is now due, owing and unpaid.

WHEREFORE, plaintiff prays judgment against defendants in the sum of Twenty Seven Thousand Nineteen Dol-

lars Thirty-Nine Cents ($27,019.39) with interest at six per cent from the 6th day of November, 1944, and costs.

BYRON B. HARLAN,
*United States Attorney.*

CHARLES B. GINOCCHIO,
*Ass't United States Attorney,*
Room 722, United States Post Office and Court House, Cincinnati, Ohio.

## EXHIBIT "A"

## WAR DEPARTMENT

## OFFICE OF THE UNDER SECRETARY

## WASHINGTON

## DETERMINATION OF EXCESSIVE PROFITS

Pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, which term refers to said Act as last amended 14 July 1943 and as affected by Title VII of the Revenue Act of 1943 so far as applicable.

WHEREAS, Southern Fireproofing Company, a partnership composed of Jacob Lichter and his wife, Jennie L. Lichter, of Cincinnati, Ohio (hereinafter referred to as the Contractor) holds the following subcontracts subject to renegotiation pursuant to the provisions of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended (hereinafter referred to as the Act),

said subcontracts being under prime contracts and being dated and for the amounts, all as described below:

| Name of Prime Contractor and Prime Contract No. | Name and Location of Job | Date of Subcontract | Final Subcontract Price |
|---|---|---|---|
| Ring Construction Co. W-1088-eng-1638 | Area C and E, Camp McCoy, Wisconsin. | 3-30-42 | $263,611.80 |
| Pearson Construction Co. W-559-eng-5870 | Division A-4, Camp Breckenridge, Morganfield, Kentucky. | 4-5-42 | 115,135.84 |
| Bass-Steenberg Fleisher Co. W-559-eng-5896 | Division A-1, Camp Breckenridge, Morganfield, Kentucky. | 4-9-42 | 74,533.48 |
| Pearson Construction Co. W-2133-eng-24 | Warehouse No. 72, Jeffersonville, Indiana. | 4-25-42 | 65,485.11 |
| Bass-Steenberg Co. W-1088-eng-1634 | Area C, Camp McCoy, Wisconsin. | 5-7-42 | 44,923.10 |
| Sherry Richards Co. W-559-eng-5984 | Armored Force Candidate School, Fort Knox, Kentucky. | 5-23-42 | 30,000.00 |
| Coppe Construction Co. W-559-eng-6009 | Additional Housing, Ft. Knox, Kentucky. | 6-5-42 | 58,500.00 |
| Frank Messer and Son W-203-eng-1783 | 10 Mobilization Warehouses, Richmond, Kentucky. | 7-20-42 | 58,500.63 |
| Penker Construction Co. W-203-eng-1842 | Combat Equipment Bldgs. Fort Knox, Kentucky. | 8-31-42 | 844.20 |
| | | Total Receipts | $710,224.16 |

AND WHEREAS, renegotiation has taken place between the Under Secretary of War and the Contractor, pursuant to the provisions of the Act, for the purpose of eliminating excessive profits realized by the Contractor on said subcontracts during the calendar year 1942; and

WHEREAS, as a basis for said renegotiation the Under Secretary of War considered certain financial, operating and other data, submitted by the Contractor or obtained by the Under Secretary of War from governmental or other

reliable sources, relating to the profits realized by the Contractor during said calendar year under said subcontracts; and

WHEREAS, the Contractor has been granted full opportunity to submit such additional information and to present such contentions as the Contractor deemed material in determining the excessiveness of said profits and the renegotiability of such subcontracts, at hearings of which due notice was given, and due consideration has been given to the financial, operating and other data and information so furnished or obtained and each of the contentions so presented;

Now, THEREFORE, pursuant to the authority and discretion vested in the Secretary of War, the Secretary of the Navy, the Secretary of the Treasury, the Chairman of the Maritime Commission, the Administrator of the War Shipping Administration, and the respective Boards of Directors of the Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation and Rubber Reserve Company under the provisions of the Act, and duly delegated to the Under Secretary of War under subsection (f) thereof, it is hereby found and determined:

That $70,000 of the profits realized by the Contractor during the calendar year 1942 under its said subcontracts subject to renegotiation pursuant to the provisions of the Act, are excessive.

That in connection with the payment or discharge by any means of the amount of excessive profits determined hereby to have been realized by the Contractor, the Contractor shall be credited with the amount, if any, to which its partners as aforesaid, respectively, may be entitled under Section 3806 of the Internal Revenue Code, as computed by the Commissioner of Internal Revenue.

That the Contractor is directed to repay such excessive profits less such tax credit, if any, to the Treasurer of the United States.

That the excessive profits so found and determined shall be eliminated by any of the methods provided in the Act or any combination thereof; and the Commanding General, Army Service Forces, and the Commanding General, Army Air Forces, are hereby authorized and directed to take any and all action which may be necessary or desirable to effect such elimination.

20 October, 1944

ROBERT P. PATTERSON
*Under Secretary of War*

## JOINT ANSWER OF JACOB LICHTER AND JENNIE L. LICHTER, INDIVIDUALLY AND AS CO-PARTNERS

(Filed June 26, 1945)

The defendants answer the complaint herein as follows:

### FIRST DEFENSE

1. Defendants admit that they reside in Cincinnati, Hamilton County, Ohio, and do business in that city under the firm name and style of SOUTHERN FIREPROOFING COMPANY, a co-partnership.

2. Defendants say that procedures purporting to be renegotiation of defendants' subcontracts were conducted by representatives of the Secretary of War; that said procedures were not in fact negotiations between said representatives and defendants, but consisted of unilateral fiats, orders and other actions by the representatives of the Secretary of War, on evidence which defendants were not and are not advised of, and without heed to credible and

persuasive evidence which defendants tendered, all as more fully set forth hereinafter.

3. Defendants admit that, on the 20th day of October 1944, Under Secretary of War Patterson, acting under color of authority granted to him by the Renegotiation Act and pursuant to authority purported to have been delegated to him in said Act, made a determination that, of the profits realized by defendants during the calendar year 1942 on defendants' subcontracts determined by said representatives to be subject to renegotiation, $70,000.00 thereof were excessive profits. Defendants admit that the copy of the said determination, attached as Exhibit A to the Complaint, is a true and correct copy of said order of October 20, 1944, which order defendants claim to be invalid at law and of no legal effect, for the reasons hereinafter set forth.

4. Defendants admit that, if said order of October 20, 1944 is valid in law and of legal effect, which defendants deny by virtue of this said defense and defenses hereinafter set forth in this answer, they are entitled, under Section 3806 of the Internal Revenue Code, to a tax credit of $42,980.61.

5. Defendants admit that under said order of October 20, 1944, Under Secretary of War Patterson directed defendants to pay, on or before November 6, 1944, to the Treasurer of the United States the said excessive profits claimed and determined by said order, less the proper tax credit referred to in the next preceding paragraph.

6. Defendants admit that they have not petitioned the Tax Court of the United States for a re-determination of said order, and that a period of time provided in Section 403(e) (1 and 2), of the Renegotiation Act, to wit, 90 days, has expired.

Defendants state that no provision of law requires them so to petition the Tax Court of the United States, and that no such petition has been filed for the reason, among other reasons, that said order is invalid and contrary to law, as will be more specifically set forth and referred to in this said defense and in other defenses hereinafter set forth in this answer.

7. Defendants admit that they have not paid to the United States, nor has the United States withheld or eliminated by any other method, said claimed excessive profits.

8. Defendants state that the business of the Southern Fireproofing Company is the contracting for and construction of brick masonry structures, customarily by subcontracts, and that said work is in general similar to brick masonry as the same has been known in the construction industry for many years; accordingly, costs, percentage of profit, and contract prices, were ascertained, calculated and realized in a manner generally known to and in the construction industry, which manner has in no way been influenced nor changed by the emergencies of the war.

Defendants state that all of said contracts set forth in said order, Exhibit A to Complaint, were subcontracts entered into after competitive bidding on the part of the principal contractors, and further competitive bidding on the part of defendants, and the acceptance of defendants' bid as the lowest and best bid for the work covered by said contracts.

Defendants accordingly state that the prices at which they performed their contracts during the calendar year 1942 were the fair, reasonable and equitable market prices, and contained no excessive profits.

9. Defendants state that the Congress of the United States has provided statutory enactments applicable to

defendants, and commonly known as Income Taxes, included in which are normal and surtaxes, which are designed by uniform rule to exact increased taxes from defendants in greater proportion as profit increases; that defendants have duly filed the appropriate income tax return on behalf of their co-partnership and have duly filed returns of their individual incomes, and have paid the tax shown on said returns to be due.

10. Defendants accordingly deny that said amount claimed in the Complaint as excessive profits, or any amount, or any profits or excess profits, are now due, owing or unpaid, and state that defendants in fact did not earn or realize any excessive profits during said calendar year 1942.

## SECOND DEFENSE

Defendants incorporate, as if specifically re-written herein, all the allegations contained and made in the First Defense hereof.

11. Defendants state that said Renegotiation Act is contained in the following Public Laws:

> Section 403 of the 6th Supplemental National Defense Appropriation Act, 1942 (Public 528, 77th Congress), Approved April 28, 1942, as amended by Section 801 of the Revenue Act of 1942 (Public 753, 77th Congress), Approved October 21, 1942; by the Military Appropriation Act, 1944 (Public 108, 78th Congress) Approved July 1, 1943; Public 149, 78th Congress, approved July 14, 1943; and as amended in full by Section 701(b) of the Revenue Act of 1943 (Public 235, 78th Congress) Approved February 25, 1944;

and that plaintiff appears to claim that all of said laws are valid and subsisting laws as to profits realized by defendants in the calendar year 1942, despite the following:

a. That the Ring Construction Company contract, numbered W-1088-eng-1638 (Exhibit A, Complaint), was entered into prior to the enactment of any of said Public Laws.

b. That the Pearson Construction Company contract, numbered W-559-eng-5870 (Exhibit A, Complaint), was entered into prior to the enactment of any of said Public Laws.

c. That the Bass-Steenberg Fleisher Company contract, numbered W-559-eng-5896 (Exhibit A, Complaint), was entered into prior to the enactment of any of said Public Laws.

d. That the Pearson Construction Company contract, numbered W-2133-eng-24 (Exhibit A, Complaint), was entered into prior to the enactment of any of said Public Laws.

12. Defendants state that the foregoing contracts were entered into prior to the passage of any of the Public Laws which comprise the Renegotiation Act, and accordingly said Renegotiation Act may not operate retrospectively or retroactively to change, alter, amend or divest defendants of the rights and emoluments secured therein at the time of execution; that accordingly, the action of the Under Secretary of War and his representatives, and the said order of October 20, 1944 (Exhibit A, Complaint), and the prayer of the Complaint herein, are repugnant to Amendment V. of the Constitution of the United States, and defendants would be deprived of their property without due process of law if any validity were given to said order, or if the prayer of the Complaint herein is allowed.

13. Defendants refer to Paragraph 11 hereof, and state that the original Congressional action which now constitutes a part of the Renegotiation Act, became effective April 28, 1942 (Public 528, 77th Congress); and that all of the contracts between defendants and their respective principal contractors, as set forth in Exhibit A to the Complaint

herein, were entered into prior to any amendment thereof, and accordingly all of said contracts, excepting those referred to and set forth in Paragraph 11 hereof, are governed, if at all, by the said Act of April 28, 1942.

Defendants further state that by said Act of April 28, 1942, the Secretary of the Department entering into a contract as described therein, is required to insert a renegotiation or recapture clause only in contracts for an amount in excess of $100,000.00 thereafter made by such Secretary; that said legislation has a further provision requiring the general contractor with the Government to insert a like renegotiation or recapture clause only in subcontracts for an amount in excess of $100,000.00.

14. Defendants state that Bass-Steenberg Fleisher Company contract, numbered W-559-eng-5896 (Exhibit A, Complaint), the Pearson Construction Company contract, numbered W-2133-eng-24 (Exhibit A, Complaint), the Bass-Steenberg Company contract, numbered W-1088-eng-1634 (Exhibit A, Complaint), the Sherry Richards Company contract, numbered W-559-eng-5984 (Exhibit A, Complaint), the Coupe Construction Company contract, numbered W-559-eng-6009 (Exhibit A, Complaint), the Frank Messer & Son contract, numbered W-203-eng-1783 (Exhibit A, Complaint), and the Penker Construction Company contract, numbered W-203-eng-1842 (Exhibit A, Complaint), are disclosed and alleged in the Complaint herein to be less in principal amount than the sum of $100,000.00.

15. Defendants state that, as to said contracts set forth in the next preceding paragraph hereof, there was no provision of law subjecting said contracts to renegotiation, nor requiring the contractor to insert renegotiation or recapture clauses in said contracts, and that in fact in none of said contracts was there contained a renegotiation or recapture clause.

16. Defendants state, therefore, that the Complaint fails to state a cause of action as against defendants.

## THIRD DEFENSE

Defendants incorporate, as if specifically rewritten herein, all the allegations contained and made in the First and Second Defenses hereof.

17. Defendants state that, in said order of October 20, 1944, Exhibit A to Complaint, all of said contracts from which it is alleged defendants realized excessive profits in the calendar year 1942, are lumped as a group, and the determination that excessive profits have been realized during said calendar year 1942 is predicated upon a lump or group calculation of contract prices and profits thereof.

18. Defendants refer to Paragraphs 11 and 14 hereof, and state that all of said contracts set forth therein and in said Exhibit A were entered into, and were valid and subsisting contracts between defendants and their respective contracting parties, prior to the enactment of any provision of law authorizing or purporting to authorize a lumping or grouping of contracts for the purpose of determining whether excessive profits were realized in any calendar year; that the Act of April 28, 1942, clearly requires and provides that renegotiation procedures be restricted to individual contract bases, and in no way purports to permit lumping or grouping of contracts, or purports to permit the Secretary or his representatives to do so upon his own motion or discretion.

19. Defendants state, accordingly, that said order purporting to obligate and charge defendants for excessive profits realized, based upon a lump or group calculation, is invalid and contrary to law, for the reason that no legislative authority exists therefor.

20. Defendants state that the Amendment to the Renegotiation Act, Approved October 21, 1942 (Section 801 of the Revenue Act of 1942; Public 753, 77th Congress) provides that when any contractor or subcontractor holds two or more contracts or subcontracts, the Secretary in his discretion may renegotiate to eliminate excessive profits on some or all of such contracts or subcontracts as a group, without separately renegotiating the contract price of each contract or subcontract.

21. Defendants state that said Amendment to the Renegotiation Act, dated October 21, 1942, purports to bring within its requirements all contracts thereafter made, and all contracts theretofore made.

Defendants state that such enactment, purporting to bring within its provisions contracts made long before the enactment of said law, operates retroactively and retrospectively as to defendants, and therefore constitutes a repudiation of the contractual commitments of the United States, and illegally impinges upon the rights of defendants in its said contracts and the usufructs thereof, and consequently is violative of the Constitution of the United States and Amendment V thereof, by subjecting defendants' property to public use without compensation, and depriving defendants of their property without due process of law.

## FOURTH DEFENSE

Defendants incorporate, as if specifically rewritten herein, all allegations contained and made in the First, Second and Third Defenses hereof.

22. Defendants state that all data, information and figures requested by any person to whom authority was delegated by the Secretary to act in reference to renegotiation of defendants' business was furnished, and that such submissions were prepared in accordance with the rules, regu-

lations and instructions of said administrative officials, and were submitted promptly upon said request.

23. Defendants state that, in each instance that such information and data were submitted, such submission was qualified as without prejudice to the opportunity to later claim that defendants' contracts were not subject to renegotiation, and without prejudice to the opportunity to later claim that the Renegotiation Act was unconstitutional and violative of defendants' constitutional rights.

24. Defendants further state that, upon request, they at all times met with the representatives of the Secretary in the steps and proceedings leading up to the order of October 20, 1944.

25. Defendants state that, notwithstanding the fact that information and figures were submitted to representatives of the Secretary, and notwithstanding that defendants appeared at conferences for the purpose of "negotiating" and discussing whether profits realized by defendants were in fact excessive, said representatives at no time would divulge to defendants the facts and figures leading up to and compelling their conclusions, nor would said representatives actually negotiate, consider or reciprocally examine into the nature or source or relevance of information upon which conclusions were based.

Defendants further state that said representatives from time to time stated that information and data, financial and otherwise, obtained from other sources, was used in arriving at conclusions and determinations with which defendants were confronted, but at no time would said representatives divulge the nature or source or relevance thereof, nor were defendants given an opportunity to examine said information. Defendants further state that it is set forth in said order of October 20, 1944, plaintiff's Exhibit A hereto, that "certain financial, operating and

other data submitted by the contractor or obtained by the Under Secretary of War from Governmental or other reliable sources, related to the profits realized by the contractor." Defendants state that they have never been apprised of what this "operating and other data" is which relates to defendants' profits, nor do they know the other sources from which this information and data were received by the Secretary. Defendants state that they have repeatedly requested knowledge of this information and the sources thereof, but that the same has been refused, and that opportunity to examine the information and to cross-examine the person submitting the said information has been denied them. Defendants further state that an opportunity has not been granted to defendants to refute with other evidence the said information and data.

26. Defendants state that the said order of October 20, 1944, was arrived at in secret, and is in no sense a result of negotiation; that a unilateral order, such as said order of October 20, 1944, is valid, legal and binding on defendants, if at all, only after a true negotiation; that negotiation, in its legal as well as its commonly accepted definition, connotes that both parties will discuss and consider all available and known factors; but that defendants, although they submitted information, and although they presented themselves at appointed times and places, never were given an opportunity to negotiate, nor to have a hearing in its legal sense, but instead were at all times faced with orders and fiats based upon information and data unknown to defendants, and were directed to accept said orders and fiats or suffer the penalties for non-payment as set forth in said Act.

27. Defendants state that said order and determination of October 20, 1944, was arbitrarily and capriciously deter-

mined, and therefore is wholly invalid in law and without legal effect.

## FIFTH DEFENSE

Defendants incorporate, as if specifically rewritten herein, all the allegations contained and made in the First, Second, Third and Fourth Defenses.

28. Defendants state, as hereinabove set forth, that the Congress of the United States has provided statutory enactments applicable to defendants and commonly known as Income Taxes, included in which are normal and surtaxes, which are designed by uniform rule to exact increased taxes from defendants in greater proportion as profit increases; that said income tax laws provide substantial equality of treatment for all taxpayers similarly situated; that the Renegotiation Act, pursuant to which the Under Secretary of War, and his representatives, have purported to act, provides that the Secretary of the department involved, in this instance the War Department, is authorized, whenever in his sole opinion excessive profits have been realized, to refix the contract price and to recover thereafter such amount from the contractor or subcontractor as the case may be.

Defendants state that said Renegotiation Act is therefore in legal effect a taxing measure, designed to add to the revenues of the Treasury of the United States moneys which normally would be, should be and are, raised for carrying on the affairs of the Government and the effective prosecution of the war.

29. Defendants state that, as a taxing measure, said Renegotiation Act is violative of the minimal requirements of the Fifth Amendment to the Constitution of the United States, in that the moneys brought into the Treasury by virtue of said Renegotiation Act are not collected by uni-

form rule and with substantial equality of treatment of taxpayers similarly situated. Defendants state that said Act as a taxing measure is lacking in any fixed policy, standards or rules, and therefore it results and has resulted in radically different treatment to contractors, subcontractors and masonry contractors similarly situated; and that said Act, as it is lacking in specific standards to bring about substantial equality of treatment to those similarly situated, is discriminatory, and denies defendants the equal protection of the law, in violation of the Fifth Amendment to the Constitution; and in respect thereof said order of October 20, 1944, and likewise the Complaint herein, attempt to take defendants' property without due process of law and for the public use, without just compensation to defendants.

30. Defendants state that, if said Renegotiation Act is not a taxing measure, it purports to exercise powers reposing in the States composing the Union and which powers are not delegated to the United States of America, and is therefore violative of the Tenth Amendment to the Constitution of the United States.

## SIXTH DEFENSE

Defendants incorporate, as if specifically rewritten herein, all allegations contained and made in the First, Second, Third, Fourth and Fifth Defenses hereof.

31. Defendants state that if the Renegotiation Act is not a taxing measure, and if said Act does not purport to exercise power reposing in the several States of the Union, but if said Renegotiation Act purports to exercise a power reposing in the United States of America to wage war and to defend the nation, that as to defendants such power is and has been exercised therein in a confiscatory and dis-

criminatory manner and constitutes the taking of defendants' property without compensation and without due process of law, contrary to the Constitution of the United States.

## SEVENTH DEFENSE

Defendants incorporate, as if specifically rewritten herein, all allegations contained and made in the First, Second, Third, Fourth, Fifth and Sixth Defenses hereof.

32. Defendants state that, in the Act approved April 28, 1942, there was a complete absence of standards for the guidance of the Secretary or his representatives in the determination of excessive profits, and that there was contained therein no definition of the term "excessive profits" to mark the scope of the activities of the Secretary or his representatives, so that he or they would know whether their activities had been kept within the confines of the legislative will; that said Act directed the Secretary, or his representatives, "whenever in his opinion excessive profits have been realized," to renegotiate and recapture the same, but that such a broad and general order is wholly insufficient to inform administrators of the law as to the Congressional mind.

33. Complainants infer by the allegations of the Complaint that the Amendment dated October 21, 1942, is claimed to be here applicable. But defendants state that said Amendment is not here applicable to them, nor to any of said contracts set forth in Exhibit A to the Complaint.

Defendants state that said Amendment purports to define excessive profits as any amount of a contract or subcontract price which is found as the result of renegotiation to represent excessive profits; but it is patent that the mind of Congress is not made known by this purported definition, and that standards and policies circumscribing the Secre-

tary or his representatives in the determination of excess profits are not defined; and as a result of which, in any proceeding and in this proceeding, it would be and is impossible to determine what the will of Congress is or whether it has been obeyed.

34. Defendants therefore state that the Renegotiation Act as applicable to defendants is vague and uncertain, and lacking in specificity, and fails to comport with reasonable legislative standards, by reason whereof said legislation is violative of Amendment V of the Constitution of the United States.

## EIGHTH DEFENSE.

Defendants incorporate, as if specifically rewritten herein, all the allegations contained and made in the First, Second, Third, Fourth, Fifth, Sixth and Seventh Defenses hereof.

35. Defendants state that, in said Act as claimed by Complainant as applicable herein, Congress has not specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data, its will shall be effective; that there is an absence of limits and standards for the guidance of the administrators of the Act; that authority to issue regulations for the uniform operation of the broad authority delegated is not granted; and that said Act specifically does not provide for the following, which should be and are included as minimal requirements in any valid delegation of authority:

a. Any standard to guide the Secretary by policy, rules or otherwise, in determining what are excessive profits and whether or not excessive profits have been realized by defendants.

b. Any limitation upon or description of the character of material, information and data which the Secretary may consider.

c. A hearing, public or otherwise, with rights flowing therefrom, including the reception of the evidence, and the right to hear the evidence obtained by the Government, and to cross-examine in reference thereto.

d. Any rule, standard or guide in respect to disclosures to defendants of the material, information, data or evidence considered, and how the same was applied or used.

e. Any standards, guides or requirements in reference to a statement of findings of fact and the basis thereof.

f. Any standards, guides or rules which would require the Secretary to take into account such pertinent considerations as:

(1) The efficiency of the contractor and his attainments as to quantity and quality of production, and his ability to reduce costs and economize in materials and manpower.

(2) The reasonableness of the costs of the defendants.

(3) Peace-time earnings and comparison of war and peace-time profits.

(4) The nature, amount and sources of capital employed in the business; that is to say, whether or not it is public or private capital.

(5) The risk assumed.

(6) Nature and extent of contribution to the war effort.

(7) Energy and contribution, and inventive and developing genius and co-operation in the support of the war effort.

(8) The character of the business itself, including the complexity of the technique.

(9) Such other factors the consideration of which the public interest and fair equitable dealing may require.

36. Said Renegotiation Act, and the Complaint herein, therefore, purport to take the property of defendants whenever in the opinion of the Secretary or his representa-

tives, unguided by proper delegated standards, excessive profits have been realized.

37. Defendants state that, by reason of the failure of the Congress of the United States to define and limit the authority of the person to whom it delegated authority under said Renegotiation Act, their constitutional rights under Article I, Section 1, and Section 8, Clause 18, and Article III, Section 1, of the Constitution of the United States are impinged and violated.

38. Defendants further state that said Renegotiation Act delegates to officers, whose lawful function is neither legislative nor judicial, legislative and judicial power; that it delegates to the Secretary and his representatives unlimited discretion in the application of the indefinite legislation; and that said Act fails to define and limit the action of the Secretary and his representatives, and fails to provide rules, standards, and procedural safeguards against arbitrary and capricious exercise of such discretion; by reason whereof said legislation is violative of Article I, Section 1, and Section 8, Clause 18, and Article III, Section 1, of the Constitution of the United States.

WHEREFORE, defendants pray that the Complaint be dismissed and that they be ordered to go hence with their costs.

PAUL W. STEER,
STEER, STRAUSS & ADAIR,
*Attorneys for Jacob Lichter and Jennie L. Lichter individually and as co-partners,*
2215 Union Central Building,
Cincinnati 2, Ohio.

State of Ohio, County of Hamilton, ss:

Jacob Lichter, being first duly sworn, says that he is one of the defendants in the above entitled action; that he has read the foregoing Joint Answer of Jacob Lichter and Jennie L. Lichter, individually and as co-partners, and that the facts stated therein are true.

JACOB LICHTER

SWORN to before me and subscribed in my presence this 25th day of June, 1945.

LILLIAN BUSSEY,
*Notary Public in and for Hamilton County, Ohio.*
My Commission expires November 8, 1946.

## RECEIPT

Received, three copies of the above Joint Answer of Jacob Lichter and Jennie L. Lichter, individually and as co-partners, this 26th day of June, 1945.

BYRON B. HARLAN,
*United States Attorney.*

CHARLES B. GINOCCHIO,
*Ass't United States Attorney,*
Room 722, United States Post Office and Court House, Cincinnati, Ohio.

## MOTIONS FOR JUDGMENT ON THE PLEADINGS AND FOR SUMMARY JUDGMENT

(Filed August 10, 1945)

Now comes the plaintiff, the United States of America, and by its attorneys moves the Court for judgment on the pleadings on the grounds that

(a) plaintiff is entitled to judgment as a matter of law on the undisputed facts appearing in the pleadings; and

(b) the answer does not state a defense to the claim set forth in the complaint.

In the alternative plaintiff moves for summary judgment on the ground that there is no genuine issue as to any material fact and plaintiff is entitled to judgment as a matter of law.

This Court has no jurisdiction of any question as to which the Tax Court of the United States is given exclusive jurisdiction by Section 403(e) of the Renegotiation Act.

These motions are based upon the affidavits filed on behalf of plaintiff and on the pleadings, files and records in this case.

RAWLINGS RAGLAND,
*Acting Head, Claims Division.*

BYRON B. HARLAN,
*United States Attorney.*

CHARLES B. GINOCCHIO,
*Ass't United States Attorney,*
*Attorneys for Plaintiff.*

## AFFIDAVIT OF JACOB LICHTER

(Filed November 13, 1945)

State of Ohio, County of Hamilton, ss:

Jacob Lichter, being first duly sworn, says that he is one of the defendants herein; that during the latter part of 1942, and the beginning of 1943, various conferences regarding negotiation were held throughout the country, under the auspices of the War Department; that one of these conferences was held at Columbus, Ohio, on January 21, 1943; and that the purpose of said conference was to explain and interpret renegotiation to construction industries in the southeastern area of the United States.

Affiant further says that the principal speaker and conductor of the Conference was Harry W. Loving, Chief of Price Adjustment Section, Office of Chief of Engineers, and that a transcript of Mr. Loving's statements there made was prepared by said Price Adjustment Section and reduced to writing and later mailed to all persons of the construction industry in said area.

Affiant further says that the quoted statements of Mr. Loving contained in Brief of Defendants in Opposition to Motion for Judgment on the Pleadings and for Summary Judgment were set forth in said transcript of the proceedings which was sent to defendants following the conference by the Price Adjustment Section of the Office of Chief of Engineers.

Further affiant saith not.

JACOB LICHTER

SWORN to before me and subscribed in my presence this 12th day of November, 1945.

LILLIAN BUSSEY,
*Notary Public, Hamilton County, Ohio.*
My Commission Expires Nov. 8, 1946.

## MOTION TO DISMISS

(Filed March 8, 1946)

The defendants above move that the Bill of Complaint herein be dismissed on the ground that it fails to state a claim upon which relief can be granted against defendants, and for the reason that the alleged excessive profits claimed are exempt under and by virtue of Section 403 (i)(l)(E)(F) of the Renegotiation Act, as contained in the Revenue Act of 1943, Public 235, 78th Congress, 2nd Session.

STEER, STRAUSS & ADAIR
PAUL W. STEER,
*Attorneys for Defendants,*
2115 Union Central Bldg.,
Cincinnati 2, Ohio.

JOHN F. SONNETT,
*Assistant Attorney General,*
RAY J. O'DONNELL,
*Acting United States Attorney,*
FREDERICK W. JOHNSON,
*Assistant United States Attorney,*
*Attorneys for Plaintiff.*

*Of Counsel*
WALTER LOWRY,
A. MORRIS KOBRICK,
*Attorneys, Dept. of Justice.*

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed June 21, 1946)

This cause came on for hearing before the Court on February 18, 1946, on the motions of plaintiff for summary judgment and for judgment on the pleadings, and the Court, having considered the pleadings, the motions filed by plaintiff, the affidavits filed in support thereof and in opposition thereto, and having considered the motion to dismiss the complaint thereafter filed by defendants and the briefs and arguments of counsel, and having taken the case under advisement, now finds the facts and states the conclusions of law as follows:

### I

### FINDINGS OF FACT

(1) At all times herein mentioned, defendants resided in Cincinnati, Hamilton County, Ohio, and did business in that city as co-partners under the firm name and style of Southern Fireproofing Company.

(2) The business of the Southern Fireproofing Company is the construction of brick masonry structures customarily by subcontracts, a type of work which is in general similar to brick masonry work as it has been known in the construction industry for many years. Defendants allege, and for the purpose of these findings it is assumed, that the prime contracts set out in Exhibit A to the complaint were contracts with a Department, awarded as a result of competitive bidding for the construction of buildings and facilities, and that the subcontracts involved in this action were subcontracts under said prime contracts, and were obtained by defendants after further competitive bidding.

(3) On October 20, 1944, Robert P. Patterson, then Under Secretary of War, acting pursuant to the Renegotiation Act

as amended, made a unilateral order (in the words and figures set out in Exhibit A to the complaint) determining that defendants had realized excessive profits of $70,000 during the calendar year 1942 on the subcontracts described below:

| Name of Prime Contractor and Prime Contract No. | Name and Location of Job | Date of Subcontract | Final Subcontract Price |
|---|---|---|---|
| Ring Construction Co. W-1088-eng-1638 | Area C and E, Camp McCoy, Wisconsin. | 3-30-42 | $263,611.80 |
| Pearson Construction Co. W-559-eng-5870 | Division A-4, Camp Breckenridge, Morganfield, Kentucky. | 4-8-42 | 115,135.84 |
| Bass-Steenberg Fleisher Co. W-559-eng-5896 | Division A-1, Camp Breckenridge, Morganfield, Kentucky. | 4-9-42 | 74,533.48 |
| Pearson Construction Co. W-2133-eng-24 | Warehouse No. 72, Jeffersonville, Indiana. | 4-25-42 | 65,485.11 |
| Bass-Steenberg Co. W-1088-eng-1634 | Area C, Camp McCoy, Wisconsin. | 5-7-42 | 44,923.10 |
| Sherry Richards Co. W-559-eng-5984 | Armored Force Candidate School, Fort Knox, Kentucky. | 5-23-42 | 30,600.00 |
| Coupe Construction Co. W-559-eng-6009 | Additional Housing, Ft. Knox, Kentucky. | 6-8-42 | 56,500.00 |
| Frank Messer and Son W-203-eng-1783 | 10 Mobilization Warehouses, Richmond, Kentucky. | 7-20-42 | 58,590.63 |
| Penker Construction Co. W-203-eng-1842 | Combat Equipment Bldgs. Fort Knox, Kentucky. | 8-31-42 | 844.20 |
| | | Total Receipts | $710,224.16 |

Defendants' profit, before taxes and before renegotiation, on these subcontracts was determined by the representatives of the Under Secretary of War to be $136,429.00.

(4) On October 20, 1944, the Under Secretary of War directed defendants to pay to the Treasurer of the United States on or before November 6, 1944, said excessive profits

of $70,000, less the tax credit, if any, to which defendants might be entitled under the provision of Section 3806 of the Internal Revenue Code.

(5) The tax credit to which defendants are entitled under Section 3806 of the Internal Revenue Code is in the sum of $42,980.61.

(6) Defendants have refused to pay to the United States said excessive profits of $70,000 less the aforesaid tax credit.

(7) Defendants have not filed a petition in the Tax Court of the United States for a redetermination of the amount of their excessive profits and the time for filing such a petition has expired.

(8) There is no genuine issue between the parties as to any material fact and plaintiff is entitled to judgment as a matter of law.

## II

## CONCLUSIONS OF LAW

(1) The Court has jurisdiction over this action and the parties thereto.

(2) The Renegotiation Act as enacted on April 28, 1942, and as thereafter amended is a constitutional exercise of the war powers of the Congress. It does not involve an unlawful delegation of legislative power to executive officials nor an exercise of judicial power by those officials. It does not involve an exercise of eminent domain powers nor has there been in this case any taking of defendants' property for public use in violation of the Constitution. The statute is not so vague or uncertain as to offend the Fifth Amendment to the Constitution nor does it deprive defendants of due process of law.

(3) The Renegotiation Act applies by its terms to the subcontracts of defendants executed before the statute was

passed and as to which final payment had not been made on April 28, 1942. Thus applied, the statute is constitutional.

(4) The Sixth Supplemental National Defense Appropriation Act of 1942, dated April 28, 1942 (Public Law 528, 77th Congress, 2nd Sess.), did not provide for or permit defendants to have a determination of excess profits in the several District Courts of the United States; that if said Sixth Supplemental National Defense Appropriation Act, as aforesaid, did so provide, the Revenue Act of 1943 deprived defendants of this right to have determined the excess profits in the several District Courts of the United States for fiscal years commencing before July 1, 1943, and for fiscal years commencing after July 1, 1943, and required all such determinations to be had in the Tax Court of the United States; and accordingly, for 1942 business, after the enactment of the Revenue Act of 1943, defendants did not have the option to have a determination of their excess profits, if any, in the District Court on the one hand, or in the Tax Court on the other hand, but were compelled to appeal any determination of excess profits to the Tax Court of the United States.

(5) The Tax Court of the United States has exclusive jurisdiction under the statute to determine all questions of law and fact relating to the amount of defendants' excessive profits for the calendar year 1942, and the failure of defendants to petition the Tax Court of the United States for a redetermination of the amount of their excessive profits renders the following allegations of the answer immaterial:

(a) That the Under Secretary of War and his representatives failed to "negotiate" with defendants and to accord to defendants a due process hearing;

(b) That defendants in fact realized no excessive profits;

(c) That the determination of the Under Secretary was arbitrary and capricious in amount and reached by arbitrary and capricious procedures;

(d) That defendants' subcontracts were exempt from renegotiation because they were subcontracts awarded as a result of competitive bidding, under prime contracts with a Department, and awarded as a result of competitive bidding, for the construction of buildings and facilities.

(e) That certain of defendants' subcontracts were exempt from renegotiation because they were less in amount than $100,000.

(f) That defendants' subcontracts were renegotiated as a group rather than one at a time.

(5) By reason of the failure of defendants to petition the Tax Court for a redetermination of their excessive profits, the order of the under Secretary has become final and is free from attack.

(6) If it be assumed that the Court has jurisdiction to determine whether or not defendants' subcontracts are subject to renegotiation, the Court concludes that the Renegotiation Act does apply to contracts and subcontracts less in amount than $100,000 and that, at least as far as the year 1942 (which is the year here involved) is concerned, to subcontracts calling for construction work. Hence, defendants' subcontracts were subject to renegotiation.

(7) The Renegotiation Act authorizes renegotiation of contracts or subcontracts in a group and the amendment of October 21, 1942 to the statute specifically authorizing such group renegotiation and made retroactive to April 28, 1942, is lawful and constitutional as applied to defendants' subcontracts executed prior to October 21, 1942, and prior to April 28, 1942.

(8) The answer does not state a defense to the claim set forth in the complaint.

*Judgment*

(9) The motions of plaintiff for judgment on the pleadings and for summary judgment are hereby granted.

It is ordered that judgment be entered for plaintiff, the United States of America, against defendants, Jacob Lichter, and Jennie L. Lichter, jointly and severally, in the amount of $27,019.39, with interest thereon at the rate of 6 per cent per annum from the 6th day of November, 1944, until paid, and with costs to the plaintiff.

Dated:

JOHN H. DRUFFEL,
*Judge of the United States District Court.*

*Have seen:*
STEER, STRAUSS & ADAIR,
PAUL W. STEER.

*Have seen:*
RAY J. O'DONNELL,
*United States Attorney.*
By W. J. DAMMARELL,
*Ass't United States Attorney.*

**JUDGMENT**

(Filed June 21, 1946)

This cause coming on to be heard upon motions of plaintiff for judgment on the pleadings and for summary judgment and upon motion of the defendants to dismiss plaintiff's complaint heretofore filed herein, the Court finds the motions of plaintiff well taken and hereby grants the same; and further finds said motion of defendants not well taken and hereby overrules the same. To all of which defendants duly except;

It is therefore ORDERED AND ADJUDGED that plaintiff, the United States of America, have judgment against

and recover of and from defendants, Jacob Lichter and Jennie L. Lichter, jointly and severally, the sum of $27,019.39, with interest thereon at the rate of 6 per cent per annum from the 6th day of November, 1944, and that plaintiff shall have and recover from said defendants its costs and charges in this behalf expended and shall have execution to enforce the terms of this judgment.

To all of which defendants duly except.

JOHN H. DRUFFEL,
*Judge of the United States District Court.*

*Have seen:*

WILLIAM J. DAMMARELL,
*Assistant United Stated Attorney.*

*Have seen:*

STEER, STRAUSS & ADAIR,
PAUL W. STEER,
*Attorneys for Defendants.*

## NOTICE OF APPEAL

(Filed July 8, 1946)

To the Honorable John H. Druffel, Judge of the District Court of the United States in and for the Southern District of Ohio, Western Division:

Notice is hereby given that Jacob Lichter and Jennie L. Lichter, doing business as the Southern Fireproofing Company, defendants herein, hereby appeal to the United States Circuit Court of Appeals for the Sixth Circuit, from an order entered on the 21st day of June, 1946, granting judgment for plaintiff in the amount of $27,019.39, together with interest and costs; and from the findings of fact and

conclusions of law entered in said District Court on said date.

STEER, STRAUSS & ADAIR,
PAUL W. STEER,
2215 Union Central Building,
Cincinnati 2, Ohio,
*Counsel for Defendants.*

HON. TOM CLARK,
*Attorney General of the United States,*
Washington, D. C.

RAY J. O'DONNELL,
*United States District Attorney,*
Federal Building, Cincinnati 2, Ohio.

WILLIAM J. DAMMARELL,
*Assistant United States District Attorney,*
Federal Building, Cincinnati 2, Ohio,
*Counsel for the Government.*

Copy handed to Ass't U. S. Atty., Wm. J. Dammarell, 7/8/46.

PAUL W. STEER

## DESIGNATION OF CONTENTS OF RECORD ON APPEAL

(Filed July 8, 1946)

To the Honorable John H. Druffel, Judge of the District Court of the United States in and for the Southern District of Ohio, Western Division:

Appellants, Jacob Lichter and Jennie L. Lichter, doing business as the Southern Fireproofing Company, designate the following portions of the record to be contained in the record on appeal in the above entitled action:

1. Complaint.
2. Joint Answer of Jacob Lichter and Jennie L. Lichter, individually and as co-partners doing business as the Southern Fireproofing Company.
3. Motion for Judgments on the Pleading, and for Summary Judgment.
4. Affidavit of Jacob Lichter.
5. Motion of Defendant to Dismiss.
6. Findings of Fact and Conclusions of Law.
7. Judgment Entry.
8. Notice of Appeal.
9. This Designation of Contents of the Record.
10. Statement of Points on which Appellants intend to Rely.
11. Clerk's Certificate.

STEER, STRAUSS & ADAIR,
PAUL W. STEER,
2215 Union Central Building,
Cincinnati 2, Ohio,
*Counsel for Appellants, Jacob Lichter and Jennie L. Lichter, doing business as Southern Fireproofing Company.*

*Appellants' Statement of Points to Be Relied Upon*

Copy of the foregoing Designation of Contents of Record On Appeal is hereby acknowledged this —— day of July, 1946.

WILLIAM J. DAMMARELL,
*Assistant United States District Attorney.*

## APPELLANTS' STATEMENT OF POINTS TO BE RELIED UPON

(Filed July 8, 1946)

To the Honorable Judge of the District Court of the United States in and for the Southern District of Ohio, Western Division:

### POINT I

The Court erred in granting the plaintiff's motion for judgment on the pleadings, and for summary judgment.

### POINT II

The Court erred in overruling the motion of defendants to dismiss the within action.

### POINT III

The Court erred in granting judgment for plaintiff.

### POINT IV

The Court's following finding of fact is erroneous:

"(8) There is no genuine issue between the parties as to any material fact and plaintiff is entitled to judgment as a matter of law."

POINT V

The following conclusions of law are erroneous:
Paragraphs 2, 3, 4, 5, 5, 6, 7, 8, and 9.

STEER, STRAUSS & ADAIR,
By PAUL W. STEER,
2215 Union Central Building,
Cincinnati 2, Ohio,
*Counsel for Defendants.*

HON. TOM CLARK,
*Attorney General of the United States,*
Washington, D. C.,
RAY J. O'DONNELL,
*United States District Attorney,*
Federal Building, Cincinnati 2, Ohio,
WILLIAM J. DAMMARELL,
*Assistant United States District Attorney,*
Federal Building, Cincinnati 2, Ohio,
*Counsel for the Government.*

RECEIPT

Receipt of copy of the foregoing Statement of Points To Be Relied Upon is asknowledged this 8th day of July 1945.

RAY J. O'DONNELL,
*United States District Attorney.*

## CLERK'S CERTIFICATE

I, Harry F. Rabe, Clerk of the District Court of the United States for the District and Division aforesaid, do hereby certify that the foregoing pages numbered from 1 to 36, inclusive, contain a true and correct copy of the record and proceedings indicated in the Designation of Contents of Record on Appeal, found on page 34, as the same appear of record and on file in the office of said Clerk in said Court in the above entitled cause.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court, at the City of Cincinnati, Ohio, the —— day of ————, 1946.

HARRY F. RABE, *Clerk,*

*Deputy.*

PROCEEDINGS IN THE

# United States Circuit Court of Appeals

FOR THE SIXTH CIRCUIT

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## CAUSE ARGUED AND SUBMITTED

(Februa y 12, 1947—Before: HICKS, SIMONS and MILLER, J.J.)

This cause is argued by Paul Steer for Appellants and by Ellis Lyons for Appellee and is submitted to the Court.

## JUDGMENT

(Filed March 10, 1947)

Appeal from the District Court of the United States for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

## OPINION

(Filed March 10, 1947)

Before HICKS, SIMONS and MILLER, Circuit Judges.

SIMONS, Circuit Judge. The questions involved in this appeal relate to the coverage and the constitutional validity of the Renegotiation Act of April 28, 1942 (56 Stat. 226) as amended by the Revenue Act of 1943 (the Act of February 25, 1944, 58 Stat. 21). The appeal is from a summary judgment entered in favor of the government against the appellants for the recovery of excessive profits made under subcontracts on construction work done for the War Department.

The appellants reside in Cincinnati and their partnership will be referred to as Southern. In 1942 Southern was a subcontractor in nine subcontracts awarded to it after competitive bidding, for the construction of buildings and facilities. The prime contracts likewise resulted from such bidding. On October 20, 1944, Robert P. Patterson, then Undersecretary of War, issued an order pursuant to the Renegotiation Act, determining that Southern had realized, during 1942, excessive profits of $70,000 on its subcontracts, and directed it to pay into the Treasury the amount of such excessive profits less a tax credit of $42,980.61. Southern filed no petition with the Tax Court for a redetermination of the Undersecretary's order, and the time for filing such petition has long since expired. Of the nine contracts involved, four were executed prior to April 28, 1942, the date of the original Renegotiation Act, and the remaining five were executed prior to October 21, 1942, the date of the initial amendment to the Renegotiation Act. Of the nine contracts involved, only two were in an amount in excess of $100,000 and were executed prior to April 28, 1942. The remaining seven were for amounts less than $100,000. Southern having failed to comply with an order of the Undersecretary of War to repay the determined excessive profits to the government, the United States brought suit for recovery. Southern defended on the ground that all of the subcontracts were specifically exempt from renegotiation

by the terms of the Act, as amended; that in any event its contracts executed prior to April 28, 1942 and those less in principal amount than $100,000 were not renegotiable; and finally, that the Renegotiation Act is unconstitutional.

The district court held the Renegotiation Act as originally enacted, and as subsequently amended, to be a constitutional exercise of the war powers of the Congress, that it applied to excessive profits realized under contracts entered into prior to April 28, 1942, and as so applied was likewise constitutional; that the failure of the appellants to seek a review *de novo* in the Tax Court of the United States, of the Undersecretary of War's determination of excessive profits as provided by § 403 (c)(2) of the Renegotiation Act, foreclosed the appellants from asserting their defenses, other than the constitutional invalidity of the Act, in the District Court of the United States.

Southern's contention that the district court had jurisdiction to consider all of its defenses, derives from the chronological sequence of the Act and its amendments, and rests specifically upon the phrasing of the amendatory provisions of §§ 403(c)(2) and 403(c) of the Revenue Act of 1943. It points out that prior to that amendment the rights of any person involved in renegotiation procedures were the same as in reference to other statutes, so that the validity of any claim or defense could be determined in a judicial proceeding. This is made clear, it says, by the fact that the original bill before the Congress contained a provision prohibiting a contractor from going into the courts, which was stricken before its passage. It also points out that the requirement, if it be a requirement, that a contractor submit his claims to the Tax Court of the United States, first appeared in the Revenue Act of 1943, enacted February 25, 1944, and that its contracts, all being part of its 1942 business, were not thereby affected. A proper appraisal of this contention requires consideration of the terms of the amendment. Section 403(c)(2) provides:

> "Any contractor or subcontractor . . . aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July 1, 1943, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days . . . after the date of the enactment of the Revenue Act of 1943, file a petition with the Tax Court of the United States for a redetermination thereof, and any such contractor or subcontractor aggrieved by a determination of the Secretary made on or after the date of the enactment of the Revenue Act of 1943, with respect to any such fiscal year, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days . . . after the date of such determination, file a petition with the Tax Court of the United States for a redetermination thereof."

It urges that this language is permissive and not mandatory, and that this is made clear by contrast with the phrasing of § 403(c), which is as follows:

> ". . . . If the Board does not make an agreement with respect to the elimination of excessive profits received or accrued, it shall issue and enter an order determining the amount, if any, of such excessive profits, and forthwith give notice thereof by registered mail to the contractor or subcontractor. In the absence of the filing of a petition with The Tax Court of the United States under the provisions of and within the time limit prescribed in subsection (e)(1), such order shall be final and conclusive and shall not be subject to review or redetermination by any court or other agency. . . . ."

It urges also that by § 403(c)(6) the application of subsection (c) is limited to amounts received or accrued

for fiscal years ending after June 30, 1943, the provision being in the following language:

> "This subsection shall be applicable to all contracts and subcontracts, to the extent of amounts received or accrued thereunder in any fiscal year ending after June 30, 1943, . . ."

From this comparison of sections it is argued that, in the absence of the filing of a petition with the Tax Court, the order that is by § 403(c) declared to be final and conclusive and not subject to review or determination by any court, applies only to amounts received or accrued under renegotiable contracts for fiscal years ending after June 30, 1943. Even were the question open it would not be difficult to reject this contention. Section 403(e)(1) of the Act provides that the Tax Court ". . . shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits. . . ." In conferring jurisdiction upon a court or administrative tribunal it is neither novel nor unusual to use the term "may" in referring to the right of an aggrieved person to initiate proceedings. Indeed, a mandatory term such as "shall," would be in negation of the clear purpose of the Congress, for in conferring upon persons the right to avail themselves of remedies, the Congress does not undertake to compel them to do so, and if an option is implicit in the term "may," it is an option not as between the Tax Court and a constitutional court, but an option to seek or refrain from seeking review, and so to abide the administrator's determination. Moreover, it is incongruous to suggest that a procedure which is to be final and conclusive and not subject to review or redetermination by any court, permits avail to a court from which appeals lie, extending in some cases even to review by the Supreme Court of the United States.

But the question is not open. It was settled, in so far as present issues are concerned, by *Macauley* v. *Waterman SS. Corp.*, 327 U. S. 540, in reliance upon *Myers* v.

*Bethlehem Shipping Corp.*, 303 U. S. 41. There it was held, in rejecting argument similar to that here presented, that § 403(e)(1) confers power upon the Tax Court to decide questions of coverage, for a decision as to what are and what are not negotiable contracts is an essential part in determining the amount of a contractor's excessive profits, and the legislative history of the Renegotiation Act shows that the Congress intended the Tax Court to have jurisdiction to decide questions of fact and law. The latter included the issue raised there as it includes the issues raised here. The *Waterman* case is even broader than that in its scope, for even were we to concede that the language of the jurisdictional grant to the Tax Court is permissive rather than mandatory, Southern would still be foreclosed in presenting its claims or defenses in the district court, by the application made in the *Waterman* case of the rule which requires a litigant, before resorting to judicial remedies, to exhaust his administrative remedies. Of similar import is *U. S.* v. *Ruzicka*, — U. S. —; decided December 16, 1946. There, in considering the general scheme of the Agricultural Act of 1937, 7 U. S. C. 601 et seq., it was said, "This is not *Stark* v. *Wickard*, 321 U. S. 288. In that case it was concluded that since Congress had provided no administrative remedy for a producer to review the legality of an order against him, presumably the courts were not closed to him. But by § 8c(15) Congress has made precisely such provisions for handlers. As to them the procedural scheme is complete." If the Renegotiation Act is a constitutional exercise of the war powers of the government and was in this case constitutionally applied, the district court was right in granting summary judgment.

But Southern urges that the Act itself is unconstitutional and the government, in argument, concedes that the court was not without jurisdiction to determine whether the Act was constitutional upon its face. Southern challenges validity on the ground that the Act contains no standards for guidance in renegotiation; that

there is no definition of the term "excessive profits," no requirements of methods to be followed in administration by which Congress, the courts or public may determine whether the congressional policy has been executed. While the constitutional validity of the Renegotiation Act has not yet been presented to the Supreme Court, its decisions in comparable cases clearly indicate that recognized tests of constitutionality have been met, *Yakus* v. *U. S.*, 321 U. S. 414; *Hirabayashi* v. *U. S.*, 320 U. S. 81, 93, and inferior and intermediate courts which have considered validity are in accord. *R. E. Spaulding et al.* v. *Douglas Aircraft Co., Inc.*, 154 Fed. (2d) 419 (C. C. A. 9); *U. S.* v. *A. W. Pownall et al.*, 65 F. Supp. 147 (S. D. Cal.). So with its retroactive application. As was said by District Judge Wyzanski in *U. S.* v. *Alexander Wool Combing Co.*, 66 F. Supp. 389 (D. Mass.), in rejecting a claim that the retroactive application of the Act would be in violation of the Fifth Amendment, "If that claim could prevail in the face of *Welch* v. *Henry*, 305 U. S. 134, and *United States* v. *Hudson*, 299 U. S. 498, the place to have raised it initially was the Tax Court."

Southern's principal contention relates to the lack of precise definition of the term "excessive profits." It would be strange, indeed, if, after public discussion and criticism of excessive profits of war suppliers in two world wars and the period intervening, there would not have developed in the mind of the Congress and of administrators, some concept of the evil that the phrase connotes. There are terms in legal parlance, such as "reasonable man," or the term "invention" in the patent law, that are impossible to define, yet serve a useful purpose in assaying conduct, measuring achievement or abstractions, and courts and legislatures have evolved tests by which their application may be governed. The present statute is not without such tests, for § 701 (b) requires, in determining excessive profits, that consideration be given to the efficiency of the contractor; the reasonableness of his costs and profits; the amount and source of public and private capital employed and his net

worth; the extent of risk assumed; the nature and extent of his contribution to the war effort; the character of his business, including the complexity of his manufacturing technique; and such other factors, the consideration of which the public interest and fair and equitable dealing may require.

No constitutional infirmity inheres in a statutory grant of discretion to administrators in executing the policy of the Congress. Without discretionary latitude, narrow or broad, as the situation requires, enforcement would in most cases be impossible. As was said in *Yakus* v. *U. S.*, supra, at 424, "The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate."

The judgment below is affirmed.

## CLERK'S CERTIFICATE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SIXTH CIRCUIT

I, J. W. MENZIES, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of *Jacob Lichter et al. d/b/a Southern Fireproofing Company* v. *United States of America*, No. 10,312, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 10th day of April, A. D. 1947.

J. W. MENZIES,
*Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.*

(SEAL)

---

[fol. 48] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 16, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
FILED
MAY 27 1947
CHARLES ELMORE CROPLEY
CLERK

No. 1427 105

IN THE

# Supreme Court of the United States

OCTOBER TERM 1946

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JACOB LICHTER AND JENNIE L. LICHTER, individually and as co-partners doing business as SOUTHERN FIREPROOFING COMPANY, a co-partnership,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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THE JOHNSON & HARDIN CO., LAW PRINTERS
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*Petitioners,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Jacob Lichter and Jennie L. Lichter, individually and as co-partners, doing business as Southern Fireproofing Company, a co-partnership, pray that a Writ of Certiorari issue to review an order entered March 10, 1947, by the United States Circuit Court of Appeals for the Sixth Circuit, affirming a judgment of the United States District Court for the Southern District of Ohio, Western Division, which order granted a judgment against the Petitioners, in favor

of the United States of America, for the sum of $27,019.39, with interest and costs.

## SUMMARY STATEMENT

1. This case presents important questions relating to and involving the Renegotiation Act, which is contained in the following:

*Sixth Supplemental National Defense Appropriation Act, 1942* (Act of April 28, 1942, Public Law 528, 77th Cong., 2nd Sess., 56 Stat. 226);

*Revenue Act of 1942* (Act of October 21, 1942, Public Law 753, 77th Cong., 2nd Sess., 56 Stat. 298);

*Military Appropriation Act, 1944* (Act of July 1, 1943, Public Law 108, 78th Cong., 2nd Sess., 57 Stat. 347); Act of July 14, 1943 (Public Law 149, 78th Cong., 1st Sess., 57 Stat. 569);

*Revenue Act of 1943* (Act of February 25, 1944, Public Law 235, 78th Cong., 2nd Sess., 58 Stat. 21).

2. On October 20, 1944, Robert P. Patterson, then Under Secretary of War, issued a unilateral order determining that Petitioners had realized excessive profits of $70,000.00 during the calendar year 1942, and directed Petitioners to pay said amount to the Treasurer of the United States, less a tax credit of $42,980.61, or the sum of $27,019.39. Petitioners made no payment in response to this determination.

3. Thereupon this action was brought to recover the alleged excess profits in the amount of the determination.

4. The business of Petitioners is the construction of brick masonry, customarily by subcontracts, and is of a type which is generally similar to brick masonry as it has been known in the construction industry for many years (R. p. 26).

5. All contracts involved (R. p. 4) are subcontracts under prime contracts with a department of the Government, awarded as a result of competitive bidding for the construction of buildings and facilities (R. p. 26), and were obtained by Petitioners after further competitive bidding (R. p. 26).

6. Petitioners did not file a petition in the Tax Court of the United States for a redetermination of the Under Secretary's order, and the time for filing such petition has expired.

7. The District Court rendered judgment against Petitioners for $27,019.39, the amount of the determination.

## PROCEEDINGS BELOW

The case came on for hearing in the District Court on the Government's Motion for Judgment on the Pleadings and for Summary Judgment (R. p. 23), and on Petitioners' Motion to Dismiss (R. p. 25).

The District Court filed no opinion, but entered a Findings of Fact and Conclusions of Law (R. p. 26), upon which judgment was entered (R. p. 31).

The Circuit Court of Appeals rendered and filed an opinion which is contained in the Record (R. p. 40).

## JURISDICTION

Jurisdiction is conferred on this Court to review the cause by Writ of Certiorari, by Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C. Title 28, Sec. 347).

## QUESTIONS PRESENTED AND REASONS RELIED ON FOR WRIT OF CERTIORARI

### I

Does the District Court have jurisdiction to determine the matters involved in the determination of the Secretary of War that Petitioners derived excessive profits for business done in the 1942 calendar year?

Both courts below answered this question "No," for the reason that a person aggrieved by a determination of excessive profits made after the effective date of the Revenue Act of 1943, *even with respect to 1942 business,* must seek relief only in the Tax Court of the United States (District Court Conclusions of Law Nos. 4, 5 and 5, R. pp. 29-30; Circuit Court Opinion, R. p. 44).

Petitioners contend that the Revenue Act of 1943 specifically reserved to Petitioners, *with respect to 1942 business,* a privilege to have all rights, claims and matters in connection with alleged excessive profits determined in the District Court, and that the adjudication of this Honorable Court, to wit, *Macauley v. Waterman S. S. Corporation,* 327 U. S. 540, is not in conflict with such contention.

### II

If it be assumed that the District Court has jurisdiction to determine whether Petitioners' contracts are subject to renegotiation, does the Renegotiation Act exempt Petitioners' subcontracts?

The trial court found all facts necessary to sustain the claim that Petitioners' subcontracts are exempt from renegotiation as subcontracts under prime contracts with a department, awarded as a result of competitive bidding (R. p. 26), but nevertheless it held that the Tax Court of the United States only had jurisdiction, without regard to such uncontradicted facts which, under the Renegotiation Act, would specifically exempt such business (District Court

Conclusions of Law Nos. 4, 5 and 5, R. pp. 29-30; Circuit Court Opinion, R. pp. 43-44).

Petitioners contend that the trial court has jurisdiction, for the reason set forth in I above, and that the Renegotiation Act specifically exempts Petitioners' subcontracts as subcontracts under prime contracts with a department of the Government, awarded as the result of competitive bidding for the construction of buildings and facilities, by virtue of Section 403(i) (1) and Section 701(d) of the Act.

## III

With respect to Petitioners' subcontracts and the determination that excessive profits were derived therefrom, is the Renegotiation Act, so applied, unconstitutional?

The courts below answered this question "No," for the following reasons:

That the Renegotiation Act is a proper exercise of the war powers of Congress; that the Act does not involve an unlawful delegation of legislative power to executive officials nor an exercise of judicial powers by such officials; that the Act does not involve an exercise of eminent domain; that Petitioners' property has not been taken for public use in violation of the constitution; that the Act is not so vague and uncertain as to offend the constitution; and that Petitioners are not and were not deprived of due process of law (District Court Conclusions of Law No. 2, R. p. 28; Circuit Court Opinion, R. pp. 44-46).

Petitioners contend that the Renegotiation Act is unconstitutional, for the following reasons:

1. That the Renegotiation Act violated standards required of legislation under the Constitution of the United States, for the reason that it is indefinite and uncertain in that there is no legal definition of the term "excessive profits."

2. That the legislative function residing in the Congress of the United States is improperly delegated.

3. That the determination constitutes a taking of Petitioners' property without due process of law, contrary to the Constitution of the United States.

4. That the determination constitutes a taking of Petitioners' property for public use without compensation.

Petitioners submit that this is peculiarly a case for the exercise of this Court's power of supervision and review for the following reasons:

1. The Renegotiation Act is important as war legislation, and continues to be important because cases and matters are still pending, not only in the administrative branches of the Government, but in the Tax Court of the United States, and in the United States District Courts and Circuit Courts. It is therefore of broad, general and public interest, and this Court should settle the several questions involved by reviewing the cause.

2. The courts below have held the Renegotiation Act constitutional. This holding is in conflict with:

*Panama Refining Co.* v. *Ryan*, 293 U. S. 388;
*U. S.* v. *Cohen Groc. Co.*, 255 U. S. 81;
*Weeds* v. *U. S.*, 255 U. S. 109;
*Schechter Poultry Co.* v. *U. S.*, 295 U. S. 495.

3. Serious constitutional questions are involved. In such instances a citizen should be entitled to a review by the highest court in the land.

4. Petitioners have been denied relief by reason of adjective questions alone. The law should strive to have matters of substance alone determinative of any denial of relief, particularly when the adversaries are Government and citizen.

## SPECIFICATIONS OF ERROR

1. The District Court of the United States for the Southern District of Ohio, Western Division, erred in granting judgment against Petitioners.

2. The Circuit Court of Appeals for the Sixth Circuit erred in affirming the judgment of the District Court.

## ARGUMENT

The argument and authorities relied upon follow.

WHEREFORE, Petitioners pray that a Writ of Certiorari issue to the United States Circuit Court of Appeals for the Sixth Circuit in this cause.

Respectfully submitted,

PAUL W. STEER,
2215 Union Central Building,
Cincinnati 2, Ohio,
*Attorney for Petitioners.*

Dated May 15, 1947.

## CERTIFICATE OF COUNSEL

I hereby certify that I am a member of the Bar of the Supreme Court of the United States, and that I am counsel for the Petitioners in the above entitled cause, and that, in my judgment, the foregoing petition is well founded in point of law as well as in fact; and that said petition is not interposed for delay.

Dated at Cincinnati, Ohio, May 15, 1947.

PAUL W. STEER,
*Attorney for Petitioners.*

No. _____

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JACOB LICHTER AND JENNIE L. LICHTER, individually, and as co-partners doing business as SOUTHERN FIREPROOFING COMPANY, a co-partnership,

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v.

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*Respondent.*

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## BRIEF ON BEHALF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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### With Respect to Question Presented No. 1
(Petition, Page 4)

**Under the Original Renegotiation Legislation, the Validity of Any Claim Made Thereunder Could Be Decided and Determined in the Several District Courts; the Revenue Act of 1943 (Act of February 25, 1944) First Inserted the Tax Court Provision; the Tax Court Provision Was Supplemental Rather Than in Abrogation of Pre-existing Remedies, and in Any Event the Tax Court Provision, for 1942 Business, Is Specifically Stated to Be Optional Only. The District Court Therefore Has Jurisdiction of the Entire Matter Herein and Petitioners Were Entitled to Raise All Defenses.**

It will not be controverted that prior to the Revenue Act of 1943 (the Act of February 25, 1944), the rights of any person involved in renegotiation procedures was the same as in reference to other statutes: that the validity of any claim made thereunder could be decided in the time-honored way in a *judicial* proceeding. This is abundantly clear since the original draft of the *Sixth Supplemental National Defense Appropriation Act of 1942* (Act of April 28, 1942) contained a flagrantly improper provision that no suit or action could be maintained in any court to recover from the United States any amount withheld from the contractor pursuant to the renegotiation. This evolved considerable discussion, and when the bill finally emerged, the provision against relief in the courts was stricken; the discussions on the Senate floor are indicative of the reasons. *Indicative* only of the multiple references of the foregoing is the reply given by Senator McKellar, when questioned on this point. His reply is as follows (88 Cong. Rec., 3765):

> "... It will be remembered that when the amendment was originally before the Senate, the distinguished Senator from Connecticut, Mr. Danaher, called attention to the fact that *the bill contained a provision which would prohibit a contractor from going into the courts.* As a result of the amendment of the Senator from Connecticut, *that provision was stricken out.* When it was stricken out, the language was left in such shape that the Secretary could pass upon the question, and *if the contractor did not like the decision of the Secretary, he could go into Court and endeavor to have it overruled.*" (Italics ours.)
> "..."

Accordingly, until the *Revenue Act of 1943* (Act of February 25, 1944), a person aggrieved by any order of the Secretary had the right to have the validity and the pro-

priety of any action of the Secretary decided in the time-honored constitutional fashion in the courts.

Then, as has been stated, the *Revenue Act of 1943* was passed (Act of February 25, 1944), and the provision for an appeal to the Tax Court of the United States was inserted. *It is clear, however, that in reference to fiscal years prior to July 1, 1943—as in this case for 1942 business—the Tax Court proceedings are optional only, and Petitioners' remedy theretofore had, to have rights adjudicated in the District Court, was not taken away.*

The foregoing is demonstrated by a comparison of Section 403(e) (2) and Section 403(c). Section 403(e) (2) provides as follows:

> "(2) *Any* contractor or subcontractor (excluding a subcontractor described in subsection (a)(5)(B) aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943, with respect *to a fiscal year ending before July 1, 1943,* as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, *may*, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of the enactment of the Revenue Act of 1943, file a petition with The Tax Court of the United States for a redetermination thereof, and any such contractor or subcontractor aggrieved by a determination of the Secretary made on or after the date of the enactment of the Revenue Act of 1943, with respect to any such fiscal year, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, *may*, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of such determination, file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have the same jurisdiction, powers, and duties,

and the proceeding shall be subject to the same provisions, as in the case of a petition filed with the court under paragraph (1) *except that* the amendments made to this section by the Revenue Act of 1943 which are not made applicable as of April 28, 1942, or to fiscal years ending before July 1, 1943, shall not apply." (Italics ours.)

In contrast to the *permissive* language of the foregoing, is the mandatory language of Section 403(c). Section 403 (c) is as follows:

". . . If the Board does not make an agreement with respect to the elimination of excessive profits received or accrued, it shall issue and enter an order determining the amount, if any, of such excessive profits, and forthwith give notice thereof by registered mail to the contractor or subcontractor. *In the absence of the filing of a petition* with The Tax Court of the United States under the provisions of and within the time limit prescribed in subsection (e) (1), such order shall be final and conclusive and shall not be subject to review or redetermination by any court or other agency. . . ."

Then, in Section 403(c) (6), the application of Subsection (c) are limited to amounts received or accrued (on contracts subject to renegotiation) for fiscal years ending *after* June 30, 1943. The following is the provision:

"This subsection shall be applicable to all contracts and subcontracts to the extent of amounts received or accrued thereunder in any fiscal year ending *after* June 30, 1943. . . ."

Therefore, it is almost indisputably clear that the language "*in the absence of the filing of a petition with The Tax Court such order shall be final and conclusive,*" applies only to amounts received or accrued under renegotiable

contracts for fiscal years ending *after* June 30, 1943. The contracts here involved, and amounts received or accrued thereunder, involve only the fiscal year ending December 31, 1942, that is, in the language of the Act, a *fiscal* year ending *prior* to July 1, 1943; the language in this latter instance is permissive, *in contrast* to the mandatory language of the portion of the Act dealing with amounts received or accrued for fiscal years commencing after July 1, 1943.

Thus, by the plain terms of the statute, although Petitioners might have proceeded in The Tax Court with respect to the fiscal year here involved ending before July 1, 1943, after the Secretary's determination, they were not required to do so, and in no event were Petitioners subject to the language of Section 403(c) which states that "in the absence of the filing," etc., the decision of the Secretary will be final. In other words, a clear delineation is made between fiscal years ending *after* July 1, 1943, and fiscal years ending *prior* to July 1, 1943 [illegible]e legislature left contracts and contractors for fiscal [illegible]ears prior to July 1, 1943, in the same position as they had been prior to the Revenue Act of 1943, to wit: with a right of access to the courts.

The error in the Circuit Court's reasoning (R. p. 43) in considering this contention is patent. It comments that it is not unusual for the term "may" to be used, presenting to the citizen the option of either taking a further step in the litigious course, or submitting to the administrator's determination. The error is this: in the ordinary statutory setup the option or the alternative to the citizen is clearly, as the court says, seeking further review or submitting. The point here is—and entirely missed by the Circuit Court—that by virtue of the contrast between the permissive and the mandatory language of the two situations, the usual or ordinary alternative is not presented.

Here it is not an alternative of seeking review or submitting, but an alternative of seeking review either in the Tax Court or the District Court, on the one hand, or submitting, on the other hand.

Moreover, we submit, it is not incongruous, as the Circuit Court suggests (R. p. 43), that 1942 business should have this option when 1943 et seq. business should not, because, the Circuit Court says, 1942 business would then have the right of appeal and 1943 business would not. There are two answers to this: (1) That Congress did not desire to take away from 1942 business what rights it already had, and (2) the provision in the Renegotiation Act that the Tax Court (an administrative body) should have exclusive jurisdiction *from which no appeal to the courts would lie*, is flagrantly unconstitutional and would be disregarded by the courts.

In conclusion, the jurisprudential policies and confines of decisions on jurisdictional questions should be examined. It is clear that Petitioners have a clear right to relief and exemption from renegotiation for 1942 business (Questions Presented No. II, Petition Page 4). To conclude that a citizen should be denied the right to set up and prove such on jurisdictional grounds is a conclusion which a court should come to with reluctance; to approach a jurisdictional question otherwise would make the courts a tryst for lawyers and not for the achievement of justice for the litigant. We submit that the Revenue Act of 1948 specifically reserves to Petitioners the right to have determinations under renegotiation heard and adjudicated in the time-honored fashion in the District Court; however, should we be in error in this respect, is it not indisputable that the language, and the structure of the legislation is, at best, ambiguous? The question then must be asked—should this Court not give the benefit of the doubt to Petitioners, and permit questions to be raised in the forum

chosen by the Government to collect what it considers its due from Petitioners? To deny Petitioners' right to set up defenses on ambiguous jurisdictional grounds, would be, we submit, doing an injustice not only to Petitioners, but to the administration of justice.

We are then brought to the consideration of *Macauley* v. *Waterman S. S. Corporation*, 327 U. S. 540, relied on by the Circuit Court. It is submitted that the case is not determinative of the instant issues for the following reasons:

(1) The question of the jurisdiction of the District Court was specifically left open in *Macauley* v. *Waterman S. S. Corporation* (supra). The Court there said:

> "Whether it [the District Court] can do so or not, it cannot now decide questions of coverage when the administrative agencies authorized to do so have not yet made their determination. . . ."

Here the administrative process is at an end, and the matter comes to the District Court as the forum chosen by the Government to press its claim against the citizen.

(2) The issues are not merely "coverage" and exemptions as was the case in *Macauley* v. *Waterman S. S. Corporation* (supra). The Government does not contend that the courts may not determine the constitutionality of the legislation under which it acted, so admittedly the Tax Court remedy is not "exclusive" for all matters involved. It does contend, however, that the statute cannot be looked at by the Court *for any other reason* even to see if Petitioners are within its orbit or to see whether Petitioners here obeyed the mandate of the statute. The question therefore is not whether Petitioners exhausted their administrative remedies or whether the Tax Court has exclusive jurisdiction, but whether a court, which is asked to give judgment against the citizen in favor of his Government, and which examines the statute to see if it is con-

stitutional, may also look at it to see if Congress has said it should give judgment in this sort of case. The Court, the Government contends, may read the statute for the constitutional determination, but must close its eyes to everything else, even if it be assumed that the statute specifically directed Petitioners to follow the course they have followed, which we contend is the case. If the Court looks at the statute, may it not look at it for all purposes?

*Whatever may be the law in this respect as a general proposition, the utter absurdity of it in this instance is evident when it is realized that the trial court found every fact necessary to sustain a ruling that Petitioners' contracts are exempt from renegotiation, and yet, it said, it could not adjudicate the issue completely,* because it could not look further to determine whether the statute and the exemptions were in effect at a particular time. The following will demonstrate the foregoing:

The Court found (R. p. 26) the prime contracts involved were contracts with a department awarded as a result of competitive bidding for the construction of buildings and facilities, and that Petitioners' subcontracts were likewise the result of competitive bidding. Under Section 403(i)(1), therefore, Petitioners' subcontracts were exempt from renegotiation. Then the Court said: that is as far as we can go. We cannot look at the Act to see whether the exemption was available on a certain date. The Tax Court will have to do this.

The absurdity, to reiterate, is this: the Court could determine constitutionality and it could determine the facts which entitled Petitioners to exemption, but it could not determine and say whether the exemption part of the Act was effective on a certain date so as to govern Petitioners' subcontracts.

We feel, therefore, that *Macauley* v. *Waterman S. S. Corporation* (supra) is inapplicable.

(3) If we have correctly read the statute (pages 11 and 12 hereof), it specifically says that Petitioners have the right to go to a court for 1942 business. Should they be compelled to go to the administrative level to have it decide that the statute says they didn't have to go to the administrative level, but instead, had the option of going to a court? If the statute says that Petitioners may go to a court, why may they not go and do as the statute directs? It is not a question of coverage, exemption, or exclusive jurisdiction of the Tax Court. The question is whether Petitioners have followed a statutory direction as to procedure. We submit that the Court may look at the statute to see if they have, and if they have, to so find. We submit further that Petitioners have precisely conformed to the statute, and if the Court had not been erroneously restrained by *Macauley* v. *Waterman S. S. Corporation* (supra), it would have so found. In any event this question was not decided in *Macauley* v. *Waterman S. S. Corporation* (supra) and is not a bar to the Court reviewing Petitioners' contentions.

## With Respect to Question Presented No. II

(Petition, Page 4)

**If It Be Assumed That the District Court Has Jurisdiction of This Cause for the Reason Set Forth Hereinabove, We Contend That Petitioners' Contracts Are Exempt under the Revenue Act of 1943 (Act of February 25, 1944), as Competitive Subcontracts under a Contract with a Department of the Government, Awarded as a Result of Competitive Bidding for the Construction of Buildings and Facilities.**

Actually the contracts herein were doubly competitive since they were entered into after competitive bidding on the part of the prime contractors and further competitive bidding on the part of defendants and other masonry con-

tractors. This is admitted by virtue of the Government's Motions and the trial court so found (Findings of Fact, R. p. 26).

The original Renegotiation Act (April 28, 1942) purported to blunderbus all contracts involving more in principal amount than $100,000.00. Later, on the first amendment to the Act, October 21, 1942, certain contracts and subcontracts were made exempt and the Secretary was given permission to exempt certain others *as of and related back to April 28, 1942.* Then, in the *Revenue Act of 1943*, passed February 25, 1944, competitive construction contracts and subcontracts with the Department *were made exempt; and here again, as to subcontracts, the exemption related back as if it "had been a part of Section 403 on the date of its enactment"* on April 28, 1942. The 1943-44 Act provides as follows:

> "*Section 403(i) (1).* The provision of this section shall not apply to—
>
> (E) Any contract with a Department, awarded as a result of competitive bidding, for the construction of any building, structure, improvement, or facility; or
>
> (F) Any subcontract, directly or indirectly under a contract or subcontract to which this section does not apply by reason of this paragraph."
>
> "*Section 701(d)—Effective Date*
>
> The amendments made by subsection (b) shall be effective only with respect to the fiscal years ending after June 30, 1943, *except that* (1) the amendments inserting subsections (a) (4) (C), (a) (4) (D), (i) (1) (C), (i) (1) (D), *(i) (1) (F)*, (i) (3), and (1) in Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, *shall be effective as if such amendments and subsections had been a part of Section 403 of such Act on the date of its enactment*, and (2) the amendments adding to subsection (d) and (e) (2) to Section 403 of such Act shall be effective from the date of the enactment of this Act." (Italics ours.)

The foregoing provide that subcontracts under prime contracts with a Department of the Government awarded as a result of competitive bidding for the construction of buildings and facilities, are exempt from all provisions of the Renegotiation Act, retroactive to April 28, 1942.

In the mention of the matter in the Court below by Government's counsel, it is indicated that because Section 403(i) (1) (E) relates back only to July 1, 1943, then Section 403(i) (1) (F) is related back only to that date. This contention is maintained by the Government despite the clear and succinct language of the "effective date" provision, Section 701(d), which provides that Section 403 (i) (1) (F) "shall be effective as if such amendments and subsections had been a part of Section 403 of such Act on the date of its enactment" (April 28, 1942). Congress here clearly desired subcontracts to be exempt, back to April 28, 1942, and prime contracts to be exempt only from July 1, 1943. This is indisputably shown by the Senate Report on the Revenue Bill of 1943 (Report No. 627; 78th Cong.; 1st Sess.); the House Report (Report No. 871; 78th Cong., 1st Sess.); and the Conference Report in the House of Representatives (Report No. 1079; 78th Cong., 1st Sess.). The Senate Report (Report No. 627) states as follows (page 100):

> "3. *SUBCONTRACTS* UNDER EXEMPT CONTRACTS OR *SUBCONTRACTS* [Subsec. (i) (1) (I) of the Finance Committee Bill; (i) (1) (E) of the House Bill].
>
> "Under existing law, considerable confusion results from the fact that a *subcontract* may be subject to renegotiation even though the prime contract or any intermediate subcontract may not be so subject. *The House Bill exempted such contracts as were directly or indirectly under an exempt contract or subcontract.*

"The exemption in the House Bill went to contracts and subcontracts exempted from the provisions of the renegotiation section and to those to which that section was inapplicable by reason of paragraph (1) of subsection (i). Under the committee bill, the exemption is restricted to contracts and subcontracts to which the renegotiation section is made inapplicable by the paragraph.

"*There is an important difference between the House and the committee bill in this respect, further, in that the committee bill makes the exemption retroactive to April 28, 1942.* The House exemption applied only to amounts received or accrued under such contracts or subcontracts in fiscal years of the contractor or subcontractor ending after June 30, 1943." (Italics ours.)

It is important to note that the foregoing relates to or deals with subcontracts only. Observe the heading itself: "*Subcontracts* Under Exempt Contracts or *Subcontracts.*" The prime contract exemption is taken up separately at another place in the Report (Report No. 627, p. 103). The difference between the House and the Senate bills are shown positively to be: (a) the House bill proposes to exempt only subcontracts under exempt prime contracts and subcontracts, but related both back to April 28, 1942. The House Report (Report No. 871) states this, as follows (page 79):

"3. SUBCONTRACTS UNDER EXEMPT PRIME CONTRACTS OR SUBCONTRACTS.

"Under existing law, considerable confusion results from the fact that a subcontract may be subject to renegotiation even though the prime contract or any intermediate subcontract may not be so subject. *The bill exempt such subcontracts as are directly or indirectly under an exempt contract or subcontract.*" (Italics ours.)

Thus, the House bill proposed to exempt only subcontracts under prime contracts which were exempt. The House bill further made both prime contracts and subcontracts exempt from July 1, 1943. The Senate bill treated the two separately and related the subcontracts back to April 28, 1942.

The fact that separate treatment was given to subcontracts on the one hand and prime contracts on the other, is a flat denial that Section 403(i) (1) (F) may only apply if the prime contract was itself exempt as of April 28, 1942. To make the exemption of the prime contract a condition precedent to the exemption of a subcontract is impossible once the two are treated separately.

The only inquiry remaining is to ascertain how the difference in the two bills was resolved. A summary of House and Senate actions follows:

The Conference Report of the House (Report No. 1079, page 36) first took up the competitive construction contract general exemption which had not been contained in the House bill at all; the House agreed to the Senate amendment, thus agreeing that the present Section 403(i) (1) (E) should be in the final bill. This Conference Report in this respect is as follows:

> "*Amendment Numbered 295:* That the House recede from its disagreement to the amendment of the Senate Numbered 295, and agree to the same with an amendment as follows: on page 96, line 17, of the Senate Engrossed Amendments, strike out '(F)' and insert (E); and the Senate agree to the same."

This put the general competitive contract in the bill. Amendment No. 296 renumbered the subcontract exemption [403(i) (1) (F)] and inserted it in the final bill. Then came Amendment Numbered 297. What was accomplished by Amendment No. 297 is explained in the "Statement of the Managers [of the Conference] on the Part of the House" (Report No. 1079, p. 85), as follows:

"*Amendment Numbered 297:* Under the provisions of subsection (i) (1) (G) of the Renegotiation Act, as amended by the House bill, any subcontract directly or indirectly under a contract or subcontract exempted from the provisions of the act, or to which the act does not apply by reason of subsection (i) (1) thereof, is exempt; this amendment limits the exemption of such subcontracts under subsection (i) (1) (G) to those which are directly or indirectly under contracts or subcontracts to which the Renegotiation Act does not apply by reason of subsection (i) (1). *The House recedes.*"

Thus, the House bill's proposal that only subcontracts under exempt contracts was receded from, and the Senate's separate treatment of subcontracts adopted. This pointedly refutes the Government's treatment of this phase.

Finally, Amendment No. 309 of the Conference Report shows that the House receded and agreed to the Senate's proposals, namely, that the exemption of competitive subcontracts only under section (i) (1) (F) relates back to April 28, 1942, even though the prime contracts therefor under Section (i) (1) (E) are exempt from July 1, 1943. In the "Statement of the Managers (of the Conference) on the Part of the House" (Report No. 1079), this is clear. On page 88 the effective date provision is discussed. The Managers state:

"*Amendment No. 309:* This amendment relates to the effective dates of various provisions. *The House recedes* with amendments."

Hence the House agreed to relate the exemption for competitive subcontracts for the construction of a building or facility back to April 28, 1942, as contained in the Senate proposal.

It may be presumed that one of the compelling reasons for the House recession on the separate consideration for

subcontracts was the direct result of testimony before the Senate Committee by Joseph M. Dodge, of the Joint Price Adjustment Board. The Joint Price Adjustment Board was the top administrative agency charged with overseeing all renegotiation. Mr. Dodge was Chairman of the Board. Mr. Dodge testified on Monday, December 6, 1943, and his testimony is contained in the Committee Hearings (Committee on Finance) at pages 1074-5 ("Revenue Act of 1943, Hearings, before the Committee on Finance, U. S. Senate; 78th Cong., 1st Sess.," Government Printing Office). There he details his suggestions for changes in the Renegotiation Act. As we interpret Mr. Dodge's language he there makes the specific suggestion, in reference to the exemption, to this effect: that, although there were certain prime contracts which he felt undesirable to exempt from the renegotiation, the subcontracts under those prime contracts should be exempt from an earlier date than the prime contracts themselves. The following is his suggestion:

> "F. Retroactive application of new exemptions and related provisions: It is suggested that the exemptions of *charitable contracts*—subsection (i) (1) (D), page 125, line 25—and of *subcontracts* under exempt prime contracts—subsection (i) (1) E), page 126, line 3, and the provision for special cost allowance at the exemption line in the case of exempted products used by integrated companies—subsection (i) (3)—should be added to the list of provisions of the act which are made effective as though they had been made a part of section 403, on the date of its enactment, April 28, 1942. (See subsection (d) effective date, page 130, line 7.)"

It should especially be noted that the "subsection (i) (1) (E)" referred to by Mr. Dodge is the "(E)" section of the House bill and not the "(E)" section of the present law. The House bill "(E)" related to subcontracts only and

became the "(F)" section of the present law. The Conference Report states:

> "*Amendment Numbered 295:*
>
> "That the House recede from its disagreement to the amendment of the Senate Numbered 295, and agree to the same with an amendment as follows: "On page 96, line 17, of the Senate Engrossed Amendments, strike out '(F)' and insert (E); and the Senate agree to the same."
>
> "*Amendment Numbered 296:*
>
> "That the House recede from its disagreement to the amendment of the Senate Numbered 296, and agree to the same with an amendment as follows:
>
> "In lieu of the matter proposed to be inserted by the Senate amendment insert (F); and the Senate agree to the same."

The managers state as follows:

> "*Amendment No. 295:*
>
> "This amendment exempts from the provisions of the Renegotiation Act any contract awarded as a result of competitive bidding for the construction of any building, structure, improvement, or facility. The House recedes with a clerical amendment, relettering the sub-paragraph."
>
> "*Amendment No. 296:*
>
> "This is a clerical amendment. The House recedes with a clerical amendment relettering the sub-paragraph."

Therefore, we submit that the contracts upon which suit has been brought are exempt from all renegotiation, and because the District Court did have jurisdiction to hear the matter, Petitioners' Motion to Dismiss should have been granted.

**With Respect to Question Presented No. III**
(Petition, Page 5)

**(1) The Renegotiation Act Violates Standards Required of Legislation Under the Constitution of the United States, for the Reason That It Is Indefinite and Uncertain in That There Is No Legal Definition of the Term "Excessive Profits."**

In the enactment of April 28, 1942 (Petition, p. 1 hereof), no definition of "excessive profits" is set forth. Renegotiation was permitted whenever in the "opinion" of the Secretary "excessive profits" had been realized. In the amendment of October 21, 1942 [Section 403(4)], the term "excessive profits" was defined as "excessive profits"!

In the Act of February 25, 1944 [Section 413(a) (4) (A)], certain factors were set forth which were to be taken into consideration in any determination of excessive profits. This was an attempt to put some content into the term.

We submit, however, that the amendment of February 25, 1944, should not govern the instant case. It is 1942 business which is here involved, and the determination was not made until 1944. Should not 1942 business be governed by legislation then existing? Too, if the statute is given substance by administrative practice, which the Government contends, it is evident that the War Contract Price Adjustment Board (set up only in the later Act) was of the opinion that the 1942 Act governed 1942 business. For instance, a publication of the War Control Price Adjustment Board was issued for the "guidance of war contractors, their attorneys and accountants," and is headed "Renegotiation Act of 1942 Applicable to Fiscal Years Before July 1, 1943"; and again "Renegotiation Act of 1943 Applicable to Fiscal Years Ending After June 30, 1943." We believe it was not until these matters got into the courts,

and it was found that the 1942 Act contained no definition of excessive profits whatsoever, that the contention arose that the 1943 Act should govern 1942 business. We submit that it is neither legally proper nor fair play for the Government to contend that 1943 legislation should govern 1942 business. It is retroactivity plus. If there had been no 1942 legislation, it would be somewhat different, but there being legislation, should not the citizen be entitled to rely on the fact that it is there, and that he is covered only within the confines of it?

These factors of the Act of February 25, 1943, however, better the situation very little even if applied to the 1942 business here involved. In the first instance, those named factors may be taken into consideration, but *there is no exclusion of other factors* that may be considered. Thus, in the order of October 20, Exhibit A to plaintiff's complaint, the broad scope of the factors considered is indicated. Certain data submitted by the contractor and other information obtained by the Secretary from Governmental or "other reliable sources" (unknown to Petitioners) were used. Further, factor vii itself states that such other factors, the consideration of which the public interest and fair and equitable dealings may require, may be considered. This in itself opens the door for completely unrestrained and unfettered considerations by the Secretaries involved, and may indeed be changed from day to day or from hour to hour, consistent with, say, changes of the personnel of the Board, or any changes consistent with the temper of the Board from time to time. No greater vice is known to the law than evidence dehors the record and secret data.

*Ohio Bell Telephone Co.* v. *Public Utilities Commn. of Ohio*, 301 U. S. 292;
*Morgan* v. *U. S.*, 298 U. S. 468 and 304 U. S. 1.

In the *Ohio Bell* case the Court condemned procedures such as these in the following language:

> "From the standpoint of due process—the protection of the individual against arbitrary action—a deeper vice is this, that even now we do not know the particular or evidential facts of which the Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out. When price lists or trade journals or even government reports are put in evidence upon a trial, the party against whom they are offered may see the evidence or hear it and parry its effect. Even if they are copied in the findings without preliminary proof there is at least an opportunity in connection with a judicial review of the decision to challenge the deductions made from them. The opportunity is excluded here. *The Commission, withholding from the record the evidential facts that it has gathered here and there, contends itself with saying that in gathering them it went to journals and tax lists, as if a judge were to tell us, 'I looked at the statistics in the Library of Congress, and they teach me thus and so.' This will never do if hearings and appeals are to be more than empty forms.*"

And then, considering the factors separately, it will be noted that the emphasis in (i) is efficiency, (ii) reasonableness of costs and profits, and in (iii) amount and source of capital, and in (iv) risk assumed, (v) extent of contribution to the war effort, and (vi) complexity of business, and (vii) such other factors as might come to the mind of the administrator. Who is to say what is efficiency? Who is to say what is a reasonable cost and a reasonable profit? For instance, does increased volume warrant greater profits; and if so, how much? What is the yardstick to be used? Does the peacetime product warrant a greater profit than the wartime product? Or

supposing the contractor is still making the peacetime product, is he entitled to one profit on his peacetime product and still another profit on his wartime product? Who is to say that a manufacturer who uses private capital deserves a higher profit in dollars and percentages than a contractor who is working on public capital? And if so, how much? Who is to say what is the risk assumed in any business? Is it measured by volume of sales, net worth, or dollar amount of risk, or the Secretary's opinion? Who is to say as to the nature and extent of the contribution of the war effort? Does it mean that a plant or an organization that did not work the clock around was not making the proper contribution? What is inventive talent? Who is to determine the complexity of a manufacturing technique? And what credit can be given for this? A machine is tooled within 2/15000 of an inch. Is this to be given greater credit than laying to the line by Petitioners' masons? Who is to say what are the other factors which the Board may consider from time to time, that will place a halo over the contractor's head or hang a lawsuit around his neck?

Do not these conditions alone of the Act of February 25, 1944, show that despite the attempt to improve, Constitutional legislative standards are not met. The standards are vague, inefficient and unpredictable. The administrative actions thereunder are unpredictable. It is not possible to determine whether or not the will of Congress has been met by the administrators. Congress had not set a basic condition of fact upon whose existence or occurrence it directs that its statutory command shall be effective—neither Congress, nor the public, nor the courts, nor the contractor, no one but the administrator at the moment of the rendition of his decision, knows whether or not any particular contractor has produced an unconscionable profit or a sanctified gain.

The definition of the term "excessive profits" is the keystone of the arch on which the statute rests. If there is no definition which is definite and certain, as there is not, it follows that the statute itself must fall. Vagueness, uncertain terms and indefiniteness are legislative sins which the courts do not condone but correct by striking down the legislation.

*U. S.* v. *L. Cohen Grocery Co.*, 255 U. S. 81;
*Weeds* v. *U. S.*, 255 U. S. 109;
*Small Co.* v. *American Sugar Co.*, 267 U. S. 233;
*Schechter Poultry Co.* v. *U. S.*, 295 U. S. 495;
*Panama Refining Co.* v. *Ryan*, 293 U. S. 388.

**(2) The Legislative Function Residing in the Congress of the United States Is Improperly Delegated in the Renegotiation Act.**

The essentials of a proper delegation of legislative authority has been variably expressed. In the *Yakus* case (321 U. S. 414) the Court said (pp. 424-5):

> ". . . These essentials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by designated administrative agency, it directs that its statutory command shall be effective. . . ."

In the *Schechter* case (205 U. S. 495, 541) the Court said:

> "To summarize and conclude upon this point: Section 3 of the Recovery Act is without precedent. It supplies no standards for any trade, industry, or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. . . ."

In *Panama Refining Co.* v. *Ryan* (293 U. S. 388, 415) the Court said:

". . . Accordingly, we look to the statute to see whether the Congress has declared a policy . . . whether the Congress has set up a standard for the President's action; whether the Congress has required any finding by the President. . . . So far as this section is concerned, it gives the President an unlimited authority to determine the policy and to lay down the prohibition."

A careful study of all the cases causes the irresistible conclusion that in determining whether or not any particular legislative act is bottomed upon Constitutional legislative standards and confined within Constitutional boundaries to assure predictable administrative action—that is, not vague, not unreasonable, not inefficient, not unpredictable, etc.—three basic conditions must exist:

(a) The Act must contain a definite statement of policy or purpose.

(b) Congress itself must prescribe definite standards for the administrative guidance.

(c) The Act must prescribe methods to be followed in its administration and execution, by which not only Congress but the courts and the public can determine whether the agency has kept within the limits so prescribed by Congress.

The question then is, do these basic conditions exist with respect to the Renegotiation Act? We submit that none of these basic conditions does exist.

*As to whether there is a definite statement of policy or purpose.*

One will search in vain for a statement of policy or purpose. The Act refers to excessive profits—there may indeed be evils flowing from them—but the Act does not contain a statement of policy or purpose to give body and control to the term nor to guide the administrator. Little

more need be said in this respect. If, in fact and law, there must exist a statement of policy or purpose, as we contend, it does not exist in the Renegotiation Act.

*Panama Refining Co.* v. *Ryan* (supra).

*As to definite standards for administrative guidance and procedure to permit the Congress, the courts and the public to ascertain whether the administrator is within the limits of the legislation.*

The keystone of the Act is the determination of "excessive profits." We have shown that as to the earlier legislation no definition at all existed and that as to the 1943 Act the definition attempted is indefinite and uncertain. How then may the Congress and the courts—and the public—determine whether the administrative agency has kept within the limits prescribed by Congress?

**(3) The Determination That Petitioners Realized Excessive Profits and the Judgment Based Thereon Constitutes a Taking of Petitioners' Property Without Due Process of Law and a Taking of Petitioners' Property for Public Use Without Compensation.**

The crux of this issue is whether the determination of the Secretary of War ordering Petitioners to pay money into the United States Treasury is a taking of property for public use without compensation and without due process of law. Petitioners submit that any order in renegotiation does constitute a taking of property, and a taking for public use without compensation in violation of the Constitution of the United States. The Government contends that a Renegotiation Order is not a taking of property, but a recapture of profits, or a retaking of part of the purchase price paid. It is difficult indeed to conceive that the contention that a recapture is not a taking is seriously made. The usufruct of the contract is the consideration

for it. To modify it, whether by way of retaking part of the consideration or recapturing part of the profits taken on it, is one and the same thing. Petitioners submit that this approach under the Renegotiation Act, and the operation of the Act as to Petitioners, constitutes a disingenuous device to take property under the guise of recapture of profits if the person or contractor involved made more on the contract than in the opinion of the Government administrative agent he should have made. *This is not fair play.*

Nor indeed was it necessary, although the Government in the courts below went on at length to prove its necessity to the procurement process. In any event necessity does not beget constitutionality. Any doubt as to its necessity should be put to rest by evidence of recent date. Secretary of War Patterson wrote just a few months ago to Representative Case in connection with renegotiation, and the fact is that the bulk of the so-called excessive profits would have been returned to the Government in any event. And it would have been returned in the ordinary ways and with uniformity and fairness, and not simply when in someone's mere opinion it should be done. That letter dated November 23, 1946, is as follows:

"WAR DEPARTMENT
WASHINGTON

November 23, 1946

"Hon. Francis Case
House of Representatives
Washington, D. C.

Dear Mr. Case:

*Renegotiation of Contracts.*

You will be interested, I am sure, to learn that refunds in contract renegotiation, as of November 15,

1946, have reached $10,007,381,000. That is slightly over $10 billion. Of this total the War Department figure is $6,717,474,000.

*It is estimated that federal income and excess profits taxes would have recovered 70 percent of these figures, without renegotiation.* Even with this factor, however, the net recovery is $3 billions.

The expenses incurred in renegotiation, through December 31, 1945, were $29,772,000, of which figure the War Department expense was $22,581,000. This represents about ⅓ of 1 percent of the total recoveries.

The savings to the government were, of course, far greater than are revealed by the figures. This is due to the fact that the presence of renegotiation influenced many contractors to reduce their prices in forward contracts.

I am enclosing a set of tables relative to renegotiation that I am sure you will be interested in.

With best regards, I am

Sincerely yours

/s/ Robert P. Patterson
Secretary of War''

rpp:lm
Encl

Petitioners submit, therefore, that beyond peradventure of a doubt there has been a taking of Petitioners' property. The taking, however, may be lawful, in the exercise of the taxing power, if it could be found to operate uniformly, which, of course, it does not. The Government, however, has always stoutly and vigorously opposed the view that the Renegotiation Act was taxing legislation, as the infirmities are so clear if so viewed.

We reiterate, therefore, that there is a taking of Petitioners' property, and if the legislation is not tax legislation, there remains but one other inquiry, to wit, does the war emergency permit a disregard of the constitution so that legislation otherwise bad, is validated.

The opinions and rulings of this Court are clear that the constitution is as living and vibrant in times of war as in times of peace.

"War" legislation transcending constitutional boundaries in the First World War was stricken down. In *United States* v. *Cohen Grocery Company*, 255 U. S. 81, 88, in its opinion the Court said:

> "We are of opinion that the court below was clearly right in ruling that the decisions of this court indisputably establish that the mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guaranties and limitations of the Fifth and Sixth Amendments as to questions such as we are here passing upon."

Perhaps a more pertinent explanation is contained in *United States* v. *Schechter Poultry Co.*, 295 U. S. 495, 528. In this case it was urged that the national critis demanded a broad and extensive co-operative effort by those engaged in trade and industry, and in the event co-operative effort as seen from the executive viewpoint was not forthcoming, coercive exercise of Governmental power was called for. The Court said (p. 528):

> ". . . we are told that the provision of the statute authorizing the adoption of codes must be viewed in the light of the grave national crisis with which Congress was confronted. Undoubtedly, the conditions to which power is addressed are always to be considered when the exercise of power is challenged. Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. *Extraordinary conditions do not create or enlarge constitutional power.* The Constitution established a national government with powers deemed to be adequate, as they had proved to

be both in war and peace, but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary. . . ."

In *Home Building & Loan Association* v. *Blaisdell*, 290 U. S. 398, 425, the doctrine is again stated:

"Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency, and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which have always been, and always will be, the subject of close examination under our constitutional system."

Historically, these cases are bottomed upon firm judicial precedent, for, in *Ex Parte Milligan*, 4 Wall. 2, 120, the Court said:

". . . The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. *No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.* Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the Government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority."

The foregoing is not to deny that the war power of the Government is the power to wage war successfully. It is not restricted to the repulse of the enemy forces in the field. To wage war successfully every phase of the national life must be encompassed. It is not to say, either, that the Government should not insist that the forces of trade and industry be in full production for the benefit of the war effort. What the power to wage war successfully does not approve, however, is indiscriminate, arbitrary and capricious taking of property for public use, with insufficient standards to guide the administrative personnel, and without the uniformity, geographically or otherwise, to sustain the legislative act as a taxing measure. It should also be abundantly clear that neither the morale of the troops nor that of the Nation would have been adversely affected if the statute had been framed so that it would operate surely and uniformly and without discrimination as between persons similarly situated.

Finally, no excess profits are contained in Petitioners' contracts. This was found "beyond a reasonable doubt," we submit, by the courts below. Petitioners' contracts were each and all for brick masonry, similar to brick masonry as known in the construction industry for many years (Findings of Fact No. 2, R. p. 26). The costs, percentages of profit and contract prices of such contracts are ascertained, calculated and realized in a manner generally known to all Departments of Government and to the construction industry for many years, and the contracts were entered into upon competitive bidding on the part of the principal contractors, and further competitive bidding on the part of defendants and other masonry subcontractors (Statement of Fact No. 2, R. p. 26). Hence the prices of the contracts as let were the fair and reasonable market prices because they were determined in the manner in which time

and experience have shown to be the best means for determining such prices.

The contract, therefore, could not and did not contain excessive profits.

Petitioners accordingly urge this Honorable Court to issue its writ to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

PAUL W. STEER,
2215 Union Central Building,
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*Attorney for Petitioners.*

Dated May 15, 1947.

No. 105

IN THE

# Supreme Court of the United States

October Term, 1947

JACOB LICHTER and JENNIE L. LICHTER, individually and as co-partners doing business as SOUTHERN FIREPROOFING COMPANY, a co-partnership,

*Appellants,*

v.

UNITED STATES OF AMERICA,

*Appellee.*

## BRIEF ON BEHALF OF APPELLANTS


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THE JOHNSON & HARDIN CO., LAW PRINTERS
CINCINNATI, OHIO

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## BRIEF ON BEHALF OF APPELLANTS

### PROCEEDINGS HERE THUS FAR

On May 27, 1947, Appellants filed their Petition for a Writ of Certiorari by virtue of jurisdiction conferred on this Court to review the controversy under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C., Title 28, Sec. 347).

On June 16, 1947, Appellants' Petition for a Writ of Certiorari was granted and the case transferred to the Summary Docket. Following this, on June 23, 1947, the following order was entered:

"This cause is removed from the summary docket and is assigned for argument immediately preceding the hearing of Nos. 1295 and 1391 (*Pownall et al.* v. *United States* and *Alexander Wool Combing Co.* v. *United States.*"

## PROCEEDINGS BELOW

The case came on for hearing in the District Court for Southern District of Ohio, Western Division, on the Government's Motion for Judgment on the Pleadings and for Summary Judgment (R. p. 23), and on Appellants' Motion to Dismiss (R. p. 25).

The District Court filed no opinion, but entered a Findings of Fact and Conclusions of Law (R. p. 26), upon which judgment was entered (R. p. 31) against Appellants in favor of the United States for $27,019.39.

The Circuit Court of Appeals affirmed the District Court on March 10, 1947.

The Circuit Court of Appeals rendered and filed an opinion (R. p. 40) which is officially reported in 160 Fed. (2d) 329.

## STATEMENT OF THE CASE

(1) This case presents questions relating to and involving the Renegotiation Act, which is contained in the following:

*Sixth Supplemental National Defense Appropriation Act, 1942* (Act of April 28, 1942, Public Law 528, 77th Cong., 2nd Sess. 56 Stat. 226, 245);

*Revenue Act of 1942* (Act of October 21, 1942, Public Law 753, 77th Cong., 2nd Sess. 56 Stat. 798, 982);

*Military Appropriation Act*, 1944, Act of July 1, 1943 (Public Law 108, 78th Cong., 2nd Sess., 57 Stat. 347); Act of July 14, 1943 (Public Law 149, 78th Cong., 1st Sess., 57 Stat. 564);

*Revenue Act of 1943* (Act of February 25, 1944, Public Law 235, 78th Cong. 2nd Sess., 58 Stat. 21, 78).

(2) On October 20, 1944, Robert P. Patterson, then Under Secretary of War, issued a unilateral order determining that Appellants had realized excessive profits of $70,000.00 during the calendar year 1942, and directed Appellants to pay said amount to the Treasurer of the United States, less a tax credit of $42,980.61, or the sum of $27,019.39. Appellants made no payment in response to this determination.

Two of the foregoing facts, for reasons stated in Argument, are of cogent importance to Appellants' case: (a) that it was the *Secretary* of War who issued the order determining excessive profits to exist and not the *War Contracts Price Adjustment Board*, despite the fact that the order was issued some eight months after the effective date of the Act. The Board was set up for the first time in section 403(d) (1) of the Revenue Act of 1943 (Act of February 25, 1944); and (b) that the order relates solely to 1942 business done by Appellants.

(3) Appellants did not file a petition in the Tax Court of the United States for a redetermination of the Under Secretary's order, and the time for filing such petition has expired.

It is the contention of Appellants that a person aggrieved by a determination of excessive profits, *with respect to 1942 business*, need not seek relief from the order in the Tax Court; and that, as to such 1942 business, the Renegotiation Acts direct that the District Court is a forum in which the person aggrieved may have a complete hearing on all matters involved and relating to the determination.

(4) Thereafter this action was brought by the United States to recover the alleged excessive profits in the amount of the determination, that is, $27,019.39.

(5) The business of Appellants is the construction of brick masonry, customarily by subcontracts, and is of a

type which is generally similar to brick masonry as it has been known in the construction industry for many years (R. p. 26).

(6) All contracts involved are subcontracts under prime contracts with a department of the Government, awarded as a result of competitive bidding, for the construction of buildings and facilities (R. pp. 4, 26), and were obtained by Appellants after further competitive bidding (R. p. 26).

This is of decisive pertinence in view of the exemption provisions of the 1943-44 Act, Section 403(i) (1) (E) and (F), in the light of the "Effective Date" provisions of this latter Act, Section 701(d). These two sections of the 1943-44 Act read as follows:

> "Section 403 (i) (1). The provision of this section shall not apply to—
>
> (E) Any contract with a Department, awarded as a result of competitive bidding, for the construction of any building, structure, improvement, or facility; or
>
> (F) Any subcontract, directly or indirectly under a contract or subcontract to which this section does not apply by reason of this paragraph."
>
> "Section 701(d)—Effective Date
>
> The amendments made by subsection (b) shall be effective only with respect to the fiscal years ending after June 30, 1943, *except that* (1) the amendments inserting subsections (a) (4) (C), (a) (4) (D), (i) (1) (C), (i) (1) (D), *(i) (1) (F)*, (i) (3), and (1), in Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, *shall be effective as if such amendments and subsections had been a part of Section 403 of such Act on the date of its enactment*, and (2) the amendments adding to subsection (d) and (e) (2) to Section 403 of such Act shall be effective from the date of the enactment of this Act." (Emphasis ours.)

(7) The District Court rendered judgment against Appellants for $27,019.39, the amount of the determination.

## SPECIFICATIONS OF ERROR

(1) The District Court of the United States for the Southern District of Ohio, Western Division, erred in granting judgment against Appellants.

(2) The Circuit Court of Appeals for the Sixth Circuit erred in affirming the judgment of the District Court.

The assigned reasons for the foregoing are set forth in the following "Questions Presented and Contentions of Appellants."

## QUESTIONS PRESENTED AND CONTENTIONS OF APPELLANTS

### I.

Does the District Court have jurisdiction to determine Appellants' rights pertaining to the determination of the Secretary of War that Appellants derived excessive profits for business done in the 1942 calendar year?

Both courts below answered this question "No," for the assigned reason that a person aggrieved by a determination of excessive profits made after the effective date of the Revenue Act of 1943, *even with respect to 1942 business*, must seek relief only in the Tax Court of the United States (District Court Conclusions of Law Nos. 4, 5 and 5, R. pp. 29-30; Circuit Court Opinion, R. p. 44).

Appellants contend that the Revenue Act of 1943 specifically reserved to Appellants, *with respect to 1942 business*, a privilege to have all rights, claims and matters in connection with alleged excessive profits determined in the District Court.

Adjudications of this Honorable Court (*Macauley v. Waterman SS. Corporation*, 327 U. S. 540; *Aircraft and Diesel Equipment Corp. v. Hirsch*, 67 Sup. Ct. 1493) are not in conflict with this contention.

II.

If it be assumed that the District Court has jurisdiction to determine whether Appellants' contracts are subject to renegotiation, does the Renegotiation Act exempt Appellants' subcontracts?

The trial court found all facts necessary to sustain the claim that Appellants' subcontracts are exempt from renegotiation as subcontracts under prime contracts with a department of the Government, awarded as a result of competitive bidding (R. p. 26), but nevertheless it held that the Tax Court of the United States alone had jurisdiction, without regard to the foregoing uncontradicted facts which, under the Renegotiation Act, specifically exempt such business from renegotiation (District Court Conclusions of Law Nos. 4, 5 and 5, R. pp. 29-30; Circuit Court Opinion, R. pp. 43-44).

Appellants contend that the trial court has jurisdiction, for the reason set forth in I above, and that the Renegotiation Act specifically exempts Appellants' subcontracts as subcontracts under prime contracts with a department of the Government, awarded as the result of competitive bidding, for the construction of buildings and facilities, by virtue of Section 403(i) (1) (E) and (F) and Section 701(d) of the Act.

III.

With respect to Appellants' subcontracts and the determination that excessive profits were derived therefrom, is the Renegotiation Act, so applied, unconstitutional?

The courts below answered this question "No," for the following reasons:

That the Renegotiation Act is a proper exercise of the war powers of Congress; that the Act does not involve an unlawful delegation of legislative power to executive of-

cials nor an exercise of judicial powers by such officials; that the Act does not involve an exercise of eminent domain; that Appellants' property has not been taken for public use in violation of the constitution; that the Act is not so vague and uncertain as to offend the constitution; and that Appellants are not and were not deprived of due process of law (District Court Conclusions of Law No. 2, R. p. 28; Circuit Court Opinion, R. pp. 44-46).

Appellants contend that the Renegotiation Act is unconstitutional for the following reasons:

(1) That the Renegotiation Act violates standards required of legislation under the Constitution of the United States, for the reason that it is indefinite and uncertain in that there is no legal definition of the term "excessive profits."

(2) That the legislative function residing in the Congress of the United States is improperly delegated.

(3) That the determination constitutes a taking of Appellants' property without due process of law, contrary to the Constitution of the United States.

(4) That the determination constitutes a taking of Appellants' property for public use without compensation.

The foregoing "Questions Presented and Contentions of Appellants" will be followed seriatim in Argument.

## SUMMARY OF ARGUMENT

### I.

(Question Presented No. I This Brief Page 5)

**Under the Original Renegotiation Act, Any Controversy Thereunder Could Be Determined in the Several District Courts; the Tax Court Provisions Were First Inserted in the Revenue Act of 1943; for 1942 Business the Tax Court Provisions of the 1943 Act Are Supplemental and Not in Abrogation of the Previously Existing Remedies in the District Courts.**

**The District Court Therefore Had Jurisdiction of the within Controversy, and Appellants Were Entitled to Raise and Be Heard on All Defenses.**

**II.**

(Question Presented No. II This Brief Page 6)

**The District Court Having Jurisdiction, It and the Circuit Court of Appeals Should Have Held That Appellants' Contracts Are Exempt as Competitive Subcontracts under a Contract with a Department of the Government, Awarded as a Result of Competitive Bidding, for the Construction of Buildings and Facilities.**

**III.**

(Question Presented No. III This Brief Page 6)

**With Respect to Appellants' Subcontracts and the Determination That Excessive Profits Were Derived Therefrom, the Renegotiation Act Is Unconstitutional for the Following Reasons:**

**(1) The Renegotiation Act Violates Standards Required of Legislation under the Constitution of the United States, for the Reason That It Is Indefinite and Uncertain in That There Is No Legal Definition of the Term "Excessive Profits."**

**(2) The Legislative Function Residing in the Congress of the United States Is Improperly Delegated in the Renegotiation Act.**

**(3) The Determination That Appellants Realized Excessive Profits and the Judgment Based Thereon Constitutes a Taking of Appellants' Property without Due Process of Law and a Taking of Appellants' Property for Public Use without Compensation.**

## ARGUMENT

### I.

**Under the Original Renegotiation Act, Any Controversy Thereunder Could Be Determined in the Several District Courts; the Tax Court Provisions Were First Inserted in the Revenue Act of 1943; for 1942 Business the Tax Court Provisions of the 1943 Act Are Supplemental, and Are Not in Abrogation of the Previously Existing Remedies in the District Courts.**

**The District Court, Therefore, Had Jurisdiction of the within Controversy and Appellants Were Entitled to Raise and Be Heard on All Defenses.**

It will not be controverted that prior to the Revenue Act of 1943 (the Act of February 25, 1944), the rights of any person involved in renegotiation procedures was the same as in reference to other statutes; that any controversy thereunder could be determined, in the time-honored way, in a *judicial* proceeding. The original draft of the Sixth Supplemental National Defense Appropriation Act of 1942 (Act of April 28, 1942) contained a flagrantly improper provision that no suit or action could be maintained in any court to recover from the United States any amount withheld from the contractor pursuant to the administrative renegotiation. This resulted in the opposition such a suggestion well deserved, and when the bill finally emerged, the provision against relief in the courts was stricken; the discussions on the Senate floor are significant of the reasons. *Indicative only* of the multiple references of the foregoing is the statement of Senator McKellar, when questioned on this point. His reply is as follows (88 Cong. Rec. 3765):

> ". . . It will be remembered that when the amendment was originally before the Senate, the distinguished Senator from Connecticut, Mr. Danaher, called attention to the fact that *the bill contained a provision which would prohibit a contractor from going into the*

> *courts.* As a result of the amendment of the Senator from Connecticut, *that provision was stricken out.* When it was stricken out, the language was left in such shape that the Secretary could pass upon the question, and *if the contractor did not like the decision of the Secretary, he could go into Court and endeavor to have it overruled.*" (Emphasis ours.)
> ". . ."

Accordingly, until the Revenue Act of 1943 (Act of February 25, 1944), a person aggrieved by any order of the Secretary had the right to have the validity and the propriety of any action of the Secretary decided in the courts in the time-honored constitutional fashion.

Then, as has been stated, the Revenue Act of 1943 (sometimes referred to as the Second Renegotiation Act) was passed (Act of February 25, 1944), and the provision for a petition to the Tax Court of the United States was inserted. *However, in reference to fiscal years prior to July 1, 1943 (that is, for 1942 business) that act clearly provided that the Tax Court proceedings are optional only, and the remedy Appellants theretofore had, to have their rights adjudicated in the District Court, had not been taken away.*

The foregoing is demonstrated by a comparison and analysis of Section 403 (e) (2) and Section 403 (c) (1) in the light of the "Effective Date" provision of the Second Act, Sec. 701(d) and Section 403(c) (6) also of the Second Act. Section 403(e) (2) provides as follows:

> "(2) *Any* contractor or subcontractor (excluding a subcontractor described in subsection (a) (5) (B) aggrieved by a determination of the *Secretary* made prior to the date of the enactment of the Revenue Act of 1943, with respect *to a fiscal year ending before July 1, 1943,* as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, *may,* within ninety days (not counting

Sunday or a legal holiday in the District of Columbia as the last day) after the date of the enactment of the Revenue Act of 1943, file a petition with The Tax Court of the United States for a redetermination thereof, and any such contractor or subcontractor aggrieved by a determination of the *Secretary* made on or after the date of the enactment of the Revenue Act of 1943, with respect to any *such fiscal year* [a fiscal year ending before July 1, 1943] as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, *may*, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of such determination, file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have the same jurisdiction, powers, and duties, and the proceeding shall be subject to the same provisions, as in the case of a petition filed with the court under paragraph (1) *except that* the amendments made to this section by the Revenue Act of 1943 *which are not made applicable as of April 28, 1942,* or to fiscal years ending before July 1, 1943, shall not apply."

It is clear that this Section 403(e) (2) was not made applicable to April 28, 1942. The "Effective Date" provision, Section 701(d) provides as follows:

"Section 701(d)—Effective Date

The amendments made by subsection (b) shall be effective only with respect to the fiscal years ending after June 30, 1943, *except that* (1) the amendments inserting subsections (a) (4) (C), (a) (4) (D), (i) (1) (C), (i) (1) (D), (i) (1) (F), (i) (3), and (1) in Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, *shall be effective as if such amendments and subsections had been a part of Section 403 of such Act on the date of its enactment,* and (2) the amendments adding to subsection (d) and *(e) (2)* to Section 403 of such Act shall be effective from the *date of the enactment of this Act.*" (Emphasis ours.)

In contrast to the *permissive* language of Section 403(e) (2), not made retroactive to April 28, 1942, as shown above, is the mandatory language of Section 403(c) (1). Section 403 (c) (1) is as follows:

> ". . . If the *Board* does not make an agreement with respect to the elimination of excessive profits received or accrued, it shall issue and enter an order determining the amount, if any, of such excessive profits, and forthwith give notice thereof by registered mail to the contractor or subcontractor. *In the absence of the filing of a petition* with The Tax Court of the United States under the provisions of and within the time limit prescribed in subsection (e) (1), *such order shall be final and conclusive* and shall not be subject to review or redetermination by any court or other agency. . . ."

Then, as if to make it abundantly clear that the "in the absence of" language applied only to business *subsequent to 1942,* in Section 403(c) (6), the application of Subsection (c) is limited to fiscal years ending *after* June 30, 1943. The following is this provision:

> "This subsection shall be applicable to all contracts and subcontracts to the extent of amounts received or accrued thereunder in any fiscal year ending *after* June 30, 1943. . . ."

There is one other striking and pertinent difference and distinction between Section 403(c) (1) and Section 403(e) (2). Section 403(c) (1) relates and applies solely to orders of the War Contract Price Adjustment Board, termed therein as "the Board." On the other hand Section 403(e) (2) applies and relates solely to an order or determination of the *Secretary.* Accordingly, the design is clear that, for orders of the *Board,* the Tax Court procedures were mandatory; but for orders or determinations of the *Secretary,* the Tax Court procedures were optional because the orders

and determinations of the Secretary were to proceed upon the basis of the rights secured in the courts under the First Act.

The "order" in this cause is not a *Board* order. It is an order or determination of the *Secretary* under the First Act, i.e., The Sixth Supplemental National Defense Appropriation Act of April 28, 1942 (R. p. 5). The order, set forth in the Bill of Complaint, reads:

> "Now, Therefore, pursuant to the authority vested in the Secretary of War . . . and duly delegated to the Under Secretary of War *under Subsection (f) thereof*, it is hereby found and determined. . . ."

Thus it is the *Secretary's* determination that "aggrieves" Appellants and accordingly, Section 403(e) (2) *only* is applicable. Section 403(c) (1) can have no application as it relates solely to an order of the *Board*.

Appellants urge that it is almost indisputably clear, that the language "*in the absence of the filing of a petition with The Tax Court such order shall be final and conclusive,*" applies only to an order of the *Board* relating to renegotiable contracts for fiscal years ending *after* June 30, 1943. We are here dealing with an order of the *Secretary*, relating to contracts *in the fiscal year ending December 31, 1942*, that is, 1942 business, or, in the language of the Act, a *fiscal* year ending *prior* to July 1, 1943. Thus, the language for 1942 business is permissive, *in contrast* and opposition to the mandatory language of the portion of the Act dealing with orders of the *Board* relating to fiscal years commencing after July 1, 1943.

Therefore, by the plain terms of the statute, although Appellants might have proceeded in The Tax Court upon being aggrieved by the Secretary's determination, they were not required to do so; nor were Appellants subject to the language of Section 403(c) (1) which states that "in

the absence of the filing" etc., the decision of the *Board* will be final. In other words, a clear delineation is made between fiscal years ending *after* July 1, 1943, and fiscal years ending *prior* to July 1, 1943; the Congress left contracts and contractors, with respect to 1942 business, in the same position as they had been prior to the Revenue Act of 1943, to wit: with a right of access to the courts.

The error in the Circuit Court of Appeals' reasoning (R. p. 43) in considering this contention is patent. It comments that it is not unusual for the term "may" to be used, presenting to the citizen the option of either taking a further step in the litigious course, or submitting to the administrator's determination. The error is this: in the ordinary statutory setup, the option or the alternative to the citizen is that, as the court says, of seeking further review, or of submitting. The point here is—entirely missed by the Circuit Court of Appeals—that by virtue of the contrast between the permissive and the mandatory language of the two situations, the usual or ordinary alternative is not presented. Here, it is an alternative of seeking review *either* in the Tax Court or in the District Court, *on the one hand*, or submitting, *on the other hand*.

Moreover, we submit, it is not incongruous, as the Circuit Court of Appeals suggests (R. p. 43), that 1942 business should have this option, when 1943 et seq. business should not have it. The answer to this is clear under the Second Act. Congress specifically stated that it did not desire to take away from 1942 business what rights it already had.

In conclusion, the jurisprudential policy of deciding jurisdictional questions should be examined. It is clear that Appellants have a clear right to relief and exemption from renegotiation for 1942 business (Questions Presented No. II this Brief, pp. 17 to 25). To conclude that a citizen should be denied the right to set up and prove such right, on jurisdictional grounds alone, is a conclusion to which

a court should come with great reluctance; to approach a jurisdictional question otherwise would make the courts a tryst for lawyers and not a forum for the achievement of justice for the aggrieved citizen. We submit that the Revenue Act of 1943 specifically reserves to Appellants the right to have determinations under renegotiation heard and adjudicated in the time-honored fashion, in the District Court. It could be argued that the language of the Act is ambiguous in that it does not state, in so many words, that the previously existing right to have matters concerning 1942 business determined in the Courts, still exists. The question then must be asked—should this Court not give the benefit of the doubt to Appellants, and permit all pertinent questions to be raised in the forum *chosen by the Government?* To deny Appellants' right to set up defenses on ambiguous jurisdictional grounds, would be, we submit, doing an injustice not only to Appellants, but to the administration of justice.

We are then brought to the consideration of *Macauley* v. *Waterman S.S. Corporation*, 327 U. S. 540, erroneously relied on by the Government and by the Circuit Court of Appeals.

If Appellants' analysis of the First and Second Acts (hereinabove) is correct the *Macauley* case is not in any way controlling or dispositive here.

*First:* If, for 1942 business, there is no requirement to proceed in the Tax Court, the principle of the *Macauley* case, that prescribed administrative procedure must be exhausted, has no relevance. We submit that Appellants' analysis showing that there was no prescribed administrative procedure is correct and therefore the *Macauley* case may be put aside.

*Second:* The determination in the *Macauley* case was by the War Contracts Price Adjustment Board and not by the *Secretary* as in the instant case. Thus, if Appellants' analy-

sis of the First and Second Acts is correct, and we submit that it is, here again the *Macauley* case is of no relevance, because, as pointed out above (page 12 hereof), upon a determination of the *Secretary*, the right of access to the courts was still had—section 403(e) (2)—as it may not be had for a determination of the *Board* under Section 403(c) (1) and Section 403(e) (1).

*Third:* The issue is not merely "coverage" as it was in the *Macauley* case. The Government does not contend that the courts may not determine the constitutionality of the legislation, as indeed it could not.

*Case* v. *Bowles*, 327 U. S. 92, 99;
*Yakus* v. *United States*, 321 U. S. 414, 430.

Admittedly, then, the Tax Court remedy, purportedly "exclusive," is not exclusive for all matters involved. The question then is, what questions other than Constitutionality may be inquired into?

The Constitutionality may be inquired into because, under the framework of the Renegotiation Acts, as in the *Case* and *Yakus* cases, there is no limitation placed upon the citizen's right to object to unconstitutional legislation when called into court under the legislation. Certainly then, the Court here can inquire into the legislation to see if Appellants have obeyed it, especially since the Acts themselves, as has been pointed out above, specifically state that Appellants may take the course they have taken. In brief, it is the Government's contention that the court may look at the constitutionality but may not look further to ascertain whether Appellants have obeyed the mandate of the statute. The Court, the Government contends, may read the statute for a constitutional determination, but must close its eyes to everything else, even if it be assumed that the statute specifically directed Appellants to follow the

course they have followed, which Appellants contend they have done.

If we have correctly analyzed the statute (pages 7 to 15 hereof), it specifically says that Appellants have the right to go to a court for 1942 business. Should they be compelled to go to the administrative level to have it decide that the statute says they didn't have to go to the administrative level, but instead, had the option of going to a court? If the statute says that Appellants may go to a court, why may they not go and do as the statute directs and why may not the Court say so? It is not a question of coverage, exemption, or exclusive jurisdiction of the Tax Court. The question is whether Appellants have followed a statutory direction as to procedure. We submit that the Court may look at the statute to see if they have, and if they have, to so find. We submit further that Appellants have precisely conformed to the statute, and if the Court had not been erroneously restrained by *Macauley* v. *Waterman S.S. Corporation*, it would have so found. In any event, this question was not decided in the *Macauley* case and it is not a bar to the Court reviewing Appellants' contentions.

## II.

**The District Court Having Jurisdiction, It and the Circuit Court of Appeals Should Have Held That Appellants' Contracts Are Exempt as Competitive Subcontracts under a Contract with a Department of the Government, Awarded as a Result of Competitive Bidding, for the Construction of Buildings and Facilities.**

*The trial court found every fact necessary to sustain a ruling that Appellants' contracts are exempt from renegotiation, and yet, it said, it could not adjudicate the issue completely,* because it could not look further to determine whether the statute and the exemptions were in effect on April 28, 1942.

The Court found (R. p. 26) that the prime contracts involved were contracts with a Department of the Government, awarded as a result of competitive bidding, for the construction of buildings and facilities, and that Appellants' subcontracts were likewise the result of further competitive bidding. Actually the contracts herein were doubly competitive since they were entered into after competitive bidding on the part of the prime contractors and further competitive bidding on the part of defendants and other masonry contractors. This is admitted by virtue of the Government's Motions, and the trial court so found (Findings of Fact, R. p. 26). Under Section 403(i) (1) (E) and (F), therefore, Appellants' subcontracts were exempt from renegotiation. Then the Court said: that is as far as we can go. We cannot look at the Act to see whether the exemption was available on April 28, 1942. The Tax Court will have to do this.

Appellants contend, for the reasons set forth in "I" hereof, under Argument (pages 7 to 17), that the trial court could have and should have adjudicated the issue of this specific exemption, and accordingly we proceed to point out the reasons why Appellants are entitled to be relieved of the Secretary's determination, keeping in mind that all facts, except the relation and application of the date of the exemption, have been found in Appellants' favor.

The original Renegotiation Act (April 28, 1942) purported to blunderbus all contracts involving more in principal amount than $100,000.00. Later, on the first amendment to the Act, October 21, 1942, certain contracts and subcontracts were made exempt, and the Secretary was given permission to exempt certain others *as of and related back to April 28, 1942.* Then, in the Revenue Act of 1943, passed February 25, 1944, competitive construction contracts and subcontracts with the Department *were made exempt, and here again, as to subcontracts, the exemption*

*related back as if it "had been a part of Section 403 on the date of its enactment" on* April 28, 1942 (Section 701(d)).

The 1943-44 Act provides as follows:

> "Section 403(i) (1). The provision of this section shall not apply to—
>
> (E) Any contract with a Department, awarded as a result of competitive bidding, for the construction of any building, structure, improvement or facility; or
> (F) Any subcontract, directly or indirectly under a contract or subcontract to which this section does not apply by reason of this paragraph."
>
> "Section 701(d)—Effective Date
>
> The amendments made by subsection (b) shall be effective only with respect to the fiscal years ending after June 30, 1943, *except that* (1) the amendments inserting subsections (a) (4) (C), (a) (4) (D), (i) (1) (C), (i) (1) (D), (i) (1) (F), (i) (3) and (1) in Section 403 of the Sixth Supplemental National Defense Appropriation Act 1942, *shall be effective as if such amendments and subsections had been a part of Section 403 of such Act on the date of its enactment,* and (2) the amendments adding to subsection (d) and (e) (2) to Section 403 of such Act shall be effective from the date of the enactment of this Act." (Emphasis ours.)

The foregoing provide that subcontracts under prime contracts with a Department of the Government awarded as a result of competitive bidding for the construction of buildings and facilities, are exempt from all provisions of the Renegotiation Act, retroactive to April 28, 1942.

In the mention of the matter in the Court below by Government's counsel, it is indicated that because Section 403 (i) (1) (E) relates back only to July 1, 1943, then Section 403(i) (1) (F) is related back only to that date. This contention is maintained by the Government despite the clear and succinct language of the "effective date" provision, Section 701(d), which provides that Section 403(i) (1) (F)

"shall be effective as if such amendments and subsections had been a part of Section 403 of such Act on the date of its enactment" (April 28, 1942). Congress here clearly desired subcontracts to be exempt, back to April 28, 1942, and prime contracts to be exempt only from July 1, 1943. This is indisputably shown by the Senate Report on the Revenue Bill of 1943 (Report No. 627; 78th Cong., 1st Sess.); the House Report (Report No. 871; 78th Cong., 1st Sess.); and the Conference Report in the House of Representatives (Report No. 1079; 78th Cong., 1st Sess.). The Senate Report (Report No. 627) states as follows (page 100):

> "3. *SUBCONTRACTS* UNDER EXEMPT CONTRACTS *OR SUBCONTRACTS* [Subsec. (r) (1) (I) of the Finance Committee Bill; (i) (1) (E) of the House Bill].
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> "Under existing law, considerable confusion results from the fact that a *subcontract* may be subject to renegotiation even though the prime contract or any intermediate subcontract may not be so subject. *The House Bill exempted such contracts as were directly or indirectly under an exempt contract or subcontract.*
>
> "The exemption in the House Bill went to contracts and subcontracts exempted from the provisions of the renegotiation section and to those to which that section was inapplicable by reason of paragraph (1) of subsection (i). Under the committee bill, the exemption is restricted to contracts and subcontracts to which the renegotiation section is made inapplicable by the paragraph.
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> "*There is an important difference between the House and the committee bill in this respect, further, in that the committee bill makes the exemption retroactive to April 28, 1942.* The House exemption applied only to amounts received or accrued under such contracts or subcontracts in fiscal years of the contractor or subcontractor ending after June 30, 1943." (Emphasis ours.)

It is important to note that the foregoing relates to or deals with subcontracts only. Observe the heading itself; "*Subcontracts* Under Exempt Contracts *or Subcontracts.*" The prime contract exemption is taken up separately at another place in the Report (Report No. 627, p. 103). The difference between the House and the Senate bills are shown positively to be: (a) the House bill proposes to exempt only subcontracts under exempt prime contracts and subcontracts, but related both back to April 28, 1942. The House Report (Report No. 871) states this, as follows (page 79):

> "3. SUBCONTRACTS UNDER EXEMPT PRIME CONTRACTS OR SUBCONTRACTS.
>
> "Under existing law, considerable confusion results from the fact that a subcontract may be subject to renegotiation even though the prime contract or any intermediate subcontract may not be so subject. *The bill exempts such subcontracts as are directly or indirectly under an exempt contract or subcontract.*" (Emphasis ours.)

Thus, the House bill proposed to exempt only subcontracts under prime contracts which were exempt. The House bill further made both prime contracts and subcontracts exempt from July 1, 1943. The Senate bill treated the two separately and related the subcontracts back to April 28, 1942.

The fact that separate treatment was given to subcontracts on the one hand and prime contracts on the other, is a flat denial that Section 403(i) (1) (F) may only apply if the prime contract was itself exempt as of April 28, 1942. To make the exemption of the prime contract a condition precedent to the exemption of a subcontract is impossible once the two are treated separately.

The only inquiry remaining is to ascertain how the difference in the two bills was resolved. A summary of House and Senate actions follows:

The Conference Report of the House (Report No. 1079, page 36) first took up the competitive construction contract general exemption which had not been contained in the House bill at all; the House agreed to the Senate amendment, thus agreeing that the present Section 403(i) (1) (E) should be in the final bill. This Conference Report in this respect is as follows:

> "*Amendment Numbered 295:* That the House recede from its disagreement to the amendment of the Senate Numbered 295, and agree to the same with an amendment as follows: on page 96, line 17, of the Senate Engrossed Amendments, strike out '(F)' and insert (E); and the Senate agree to the same."

This put the general competitive contract in the bill. Amendment No. 296 renumbered the subcontract exemption [403(i) (1) (F)] and inserted it in the final bill. Then came Amendment Numbered 297. What was accomplished by Amendment Numbered 297 is explained in the "Statement of the Managers [of the Conference] on the Part of the House" (Report No. 1079, p. 85), as follows:

> "*Amendment Numbered 297:* Under the provisions of subsection (i) (1) (G) of the Renegotiation Act, as amended by the House bill, any subcontract directly or indirectly under a contract or subcontract exempted from the provisions of the act, or to which the act does not apply by reason of subsection (i) (1) thereof, is exempt; this amendment limits the exemption of such subcontracts under subsection (i) (1) (G) to those which are directly or indirectly under contracts or subcontracts to which the Renegotiation Act does not apply by reason of subsection (i) (1). *The House recedes.*"

Thus, the House bill's proposal that only subcontracts under exempt contracts be exempt was receded from, and the Senate's separate treatment of subcontracts adopted.

Finally, Amendment Numbered 309 of the Conference Report shows that the House receded and agreed to the Senate's proposals, namely, that the exemption of competitive subcontracts only under section (i) (1) (F) relates back to April 28, 1942, even though the prime contracts therefor under Section (i) (1) (E) are exempt from July 1, 1943. In the "Statement of the Managers (of the Conference) on the Part of the House" (Report No. 1079), this is clear. On page 88 the effective date provision is discussed. The Managers state:

> "*Amendment Numbered 309:* This amendment relates to the effective dates of various provisions. *The House recedes* with amendments."

Hence the House agreed to relate the exemption for competitive subcontracts for the construction of a building or facility back to April 28, 1942, as contained in the Senate proposal.

It may be presumed that one of the compelling reasons for the House recession on the separate consideration for subcontracts was the direct result of testimony before the Senate Committee by Joseph M. Dodge, of the Joint Price Adjustment Board. The Joint Price Adjustment Board was the top administrative agency charged with overseeing all renegotiation. Mr. Dodge was Chairman of the Board. Mr. Dodge testified on Monday, December 6, 1943, and his testimony is contained in the Committee Hearings (Committee on Finance) at pages 1074-5 ("Revenue Act of 1943, Hearings, before the Committee on Finance, U. S. Senate; 78th Cong., 1st Sess.," Government Printing Office). There he details his suggestions for changes in the Renegotiation Act. As we interpret Mr. Dodge's language he there makes the specific suggestion, in reference to the exemption, to this effect: that, although there were certain prime contracts which he felt undesirable to exempt from

the renegotiation, the subcontracts under those prime contracts should be exempt from an earlier date than the prime contracts themselves. The following is his suggestion:

> "F. Retroactive application of new exemptions and related provisions: It is suggested that the exemptions of *charitable contracts*—subsection (i) (1) (D), page 125, line 25—and of *subcontracts* under exempt prime contracts—subsection (i) (1) (E), page 126, line 3, and the provision for special cost allowance at the exemption line in the case of exempted products used by integrated companies—subsection (i) (3)—should be added to the list of provisions of the act which are made effective as though they had been made a part of section 403, on the date of its enactment, April 28, 1942. [See subsection (d) effective date, page 130, line 7.]"

It should especially be noted that the "subsection (i) (1) (E)" referred to by Mr. Dodge is the "(E)" section of the House bill and not the "(E")" section of the present law. The House bill "(E)" related to subcontracts only and became the "(F)" section of the present law. The Conference Report states:

> "*Amendment Numbered 295:*
>
> "That the House recede from its disagreement to the amendment of the Senate Numbered 295, and agree to the same with an amendment as follows: 'On page 96, line 17, of the Senate Engrossed Amendments, strike out "(F)" and insert (E); and the Senate agree to the same.'"
>
> "*Amendment Numbered 296:*
>
> "That the House recede from its disagreement to the amendment of the Senate Numbered 296, and agree to the same with an amendment as follows: 'In lieu of the matter proposed to be inserted by the Senate amendment insert (F); and the Senate agree to the same.'"

The managers stated as follows:

"*Amendment Numbered 295:*

"This amendment exempts from the provisions of the Renegotiation Act any contract awarded as a result of competitive bidding for the construction of any building, structure, improvement, or facility. The House recedes with a clerical amendment, relettering the sub-paragraph."

"*Amendment Numbered 296:*

"This is a clerical amendment. The House recedes with a clerical amendment relettering the sub-paragraph."

Therefore, we submit that the contracts upon which suit has been brought are exempt from all renegotiation; and because the District Court did have jurisdiction to hear the matter, Appellants' Motion to Dismiss should have been granted.

## III.

(Question Presented No. III This Brief Page 6)

**With Respect to Appellants' Subcontracts and the Determination of the Secretary That Excessive Profits Were Derived Therefrom, the Renegotiation Act Is Unconstitutional.**

(1) THE RENEGOTIATION ACT VIOLATES STANDARDS REQUIRED OF LEGISLATION UNDER THE CONSTITUTION OF THE UNITED STATES, FOR THE REASON THAT IT IS INDEFINITE AND UNCERTAIN IN THAT THERE IS NO LEGAL DEFINITION OF THE TERM "EXCESSIVE PROFITS."

In the enactment of April 28, 1942 (Sixth Supplemental National Defense Appropriation Act, 1942, Public Law 528, 77th Cong., 2nd Sess.) sometimes called the First Act, no definition of "excessive profits" is set forth. This may be stated categorically. Renegotiation was permitted whenever in the "opinion" of the Secretary "excessive profits" had been realized. Specifically, Section 403(c) provided:

"(c) The Secretary of each Department is authorized and directed, whenever in his opinion excessive profits have been realized, or are likely to be realized . . . to recover such amounts. . . ."

Neither advocacy, authority, nor argument can create a legal definition out of the foregoing, unless, of course, the mere "opinion" of an administrative official is of legal significance. Indisputably, the "opinion" of the Secretary lacks legal content. An opinion guided by definite rules and standards might be of legal significance but rules and standards to prescribe the Secretary's opinion are absent.

Then, in the amendment of October 21, 1942 [Section 403(a) (4)], confounding the issue further, "excessive profits" is defined as "excessive profits"! This statement is neither captious nor impertinent. Section 403(a) (4) provides:

"(4) The term 'excessive profits' means any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits."

"Renegotiation" in fact (Fourth Defense of Appellants, R. p. 13 and admitted by virtue of the Government's Motions for Judgment on the Pleadings and For Summary Judgment, R. p. 23) and in law (Section 403(a) (3), October 21, 1942 Act) amounts only to a refixing of the contract price by the Secretary.

It is clear, then, that up to and after the October 21, 1942 Amendment, there was no definition of "excessive profits"; "excessive profits" were profits which the Secretary, in his uncontrolled opinion, found to be excessive.

In the Act of February 25, 1944 [Revenue Act of 1943, Section 403(a) (4) (A)] certain factors were set forth which were to be taken into consideration in any determination of excessive profits. This was an attempt to put content into the term.

*However, Section 403(a) (4) (A) is not applicable to fiscal years prior to July 1, 1943,* and accordingly, it may not be presumed that these factors were used in the instant determination. The 1943 Act permits no doubt in this respect. The "Effective Date" provision of the 1943 Act provides:

> *"Section 701(d)—Effective Date*
> "The amendments made by subsection (b) *shall be effective only with respect to the fiscal years ending after June 30, 1943, except that* (1) the amendments inserting subsections (a) (4) (C), (a) (4) (D), (i) (1) (C), (i) (1) (D), (i) (1) (F), (i) (3) and (1) in Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, shall be effective as if such amendments and subsections had been a part of Section 403 of such Act on the date of its enactment, and (2) the amendments adding to subsection (d) and (e) (2) to Section 403 of such Act shall be effective from the date of the enactment of this Act." (Emphasis ours.)

Section 403(a) (4) (A) is not among the Sections related back to April 28, 1942!

Therefore, the determination of the Under Secretary of War, upon which this action is brought, is and must be upon the definition of "excessive profits" contained in the enactments of April 28, 1942, and October 21, 1942, which define "excessive profits" as "excessive profits."

In any event, we submit that it is neither legally proper nor fair play for the Government to contend that 1943-44 legislation should govern 1942 business, but, as we have pointed out, this argument need not be made, because the Act of February 25, 1944 specifically exempted 1942 business in this respect.

The Government argues, however, that the factors and standards of the Act of February 25, 1944, were actually

ordinary administrative practice and Congress inferentially approved them for all business by inserting them in the 1944 Act. This argument is specious for the obvious reason that when Congress did adopt the factors and standards of Section 403(a) (4) (A) the Act of February 25, 1944, assuming them to be the same as the factors used administratively, it specifically stated that they were to apply to fiscal years subsequent to July 1, 1943, *only*. Therefore, not only did Congress not approve the practice for prior years, but left prior years to be governed by the Statute of April 28, 1942, and October 21, 1942 alone.

On the other hand, Appellants do not shun a discussion of the factors of the Act of February 25, 1944, contained in Section 403(a) (4) (A) thereof, for they better the situation very little even if applied to the 1942 business here involved. In the first instance, certain named factors may be taken into consideration; these may be of relevance. But *there is no exclusion of other factors* that may be considered, and the cardinal sin of this is plainly shown in the action of the Secretary here. In the order of October 20, 1944, Exhibit A to the Government's complaint (R. p. 3), the sinful scope of what was considered is indicated. Certain data submitted by the contractor and other information obtained by the Secretary from Governmental or "other reliable sources" (unknown to Appellants) were used as a basis of the determination. The best that can be said for this is that the use of facts and information unknown to Appellants is candidly admitted.

Further, factor vii itself states that such other factors, the consideration of which the public interest and fair and equitable dealings may require, may be considered. This opened the door for completely unrestrained and unfettered action by the Secretary, subject to his whims, and may indeed be changed from day to day or from hour to hour, and subject, too, to changes in opinion occasioned by

changes of personnel in the Secretary's staff. No greater vice is known to the law than evidence dehors the record, and secret data; *and here, the determination itself shows on its face that information unknown to Appellants and to this Court, was used.* This Court has, on many occasions, indicated its abhorrence of such illegal procedures.

*Ohio Bell Telephone Co.* v. *Public Utilities Comm. of Ohio*, 301 U. S. 292;
*Morgan* v. *United States*, 298 U. S. 468 and 304 U. S. 1.

In the *Ohio Bell* case the Court condemned procedures such as these in the following language:

> "From the standpoint of due process—the protection of the individual against arbitrary action—a deeper vice is this, that even now we do not know the particular or evidential facts of which the Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out. When price lists or trade journals or even government reports are put in evidence upon a trial, the party against whom they are offered may see the evidence or hear it and parry its effect. Even if they are copied in the findings without preliminary proof there is at least an opportunity in connection with a judicial review of the decision to challenge the deductions made from them. The opportunity is excluded here. *The Commission, withholding from the record the evidential facts that it has gathered here and there, contents itself with saying that in gathering them it went to journals and tax lists, as if a judge were to tell us, 'I looked at the statistics in the Library of Congress, and they teach me thus and so.' This will never do if hearings and appeals are to be more than empty forms.*"

And then, considering the factors separately, it will be noted that the emphasis in (i) is efficiency, (ii) reasonable-

ness of costs and profits, and in (iii) amount and source of capital, and in (iv) risk assumed, (v) extent of contribution to the war effort, and (vi) complexity of business, and (vii) such other factors as might come to the mind of the administrator. Who is to say what is efficiency? Who is to say what is a reasonable cost and a reasonable profit? For instance, does increased volume warrant greater or lesser profits; and if so, how much? What is the yardstick to be used? Does the peacetime product warrant a greater profit than the wartime product? Or supposing the contractor is still making the peacetime product, as is the case with appellants, is he entitled to one profit on his peacetime product, and still another profit on his wartime product? Who is to say that a manufacturer who uses private capital deserves a higher profit in dollars and percentages than a contractor who is working on public capital? And if so, how much? Who is to say what is the risk assumed in any business? Is it measured by volume of sales, net worth, or dollar amount of risk, or the Secretary's opinion? Who is to say as to the nature and extent of the contribution to the war effort? Does it mean that a plant or an organization that did not work the clock around was not making the proper contribution? What is inventive talent? Who is to determine the complexity of a manufacturing technique? And what credit can be given for this? A machine is tooled within 2/15000 of an inch; is this to be given greater credit than laying to the line by Appellants' masons? Who is to say what are the other factors, and the weight given to them, which the Secretary may consider from time to time, that will place a halo over the contractor's head or place the onus of profiteer on his name?

So, assuming that the factors of Section 403(4) (A) of the Second Act were taken into consideration by the Under Secretary of War in making his determination here (although this may not properly be assumed because the Act

of February 25, 1944, specifically states that Section 403(a)(4)(A) does not apply to 1942 fiscal years), there still is no definition of "excessive profits" which is not vague, indefinite and uncertain and which prescribes the Secretary's action within proper limits.

The definition of the term "excessive profits" is the keystone of the arch on which the statute rests. If there is no definition which is definite and certain, as there is not, it follows that the statute itself must fall. Vagueness, uncertain terms and indefiniteness are legislative sins which the courts do not condone but correct by striking down the legislation.

> *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81;
> *Weeds* v. *United States*, 255 U. S. 109;
> *Small Co.* v. *American Sugar Co.*, 267 U. S. 233;
> *Schechter Poultry Co.* v. *United States*, 295 U. S. 495;
> *Panama Refining Co.* v. *Ryan*, 293 U. S. 388.

(2) THE LEGISLATIVE FUNCTION RESIDING IN THE CONGRESS OF THE UNITED STATES IS IMPROPERLY DELEGATED IN THE RENEGOTIATION ACT.

The essentials of a proper delegation of legislative authority has been variably expressed. In the *Yakus* case (321 U. S. 414) the Court said (pp. 424-5):

> ". . . These essentials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by designated administrative agency, it directs that its statutory command shall be effective. . . ."

In the *Schechter* case (205 U. S. 495, 541) the Court said:

> "To summarize and conclude upon this point: Section 3 of the Recovery Act is without precedent. It supplies no standards for any trade, industry, or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. . . ."

In *Panama Refining Co.* v. *Ryan* (293 U. S. 388, 415) the Court said:

> ". . . Accordingly, we look to the statute to see whether the Congress has declared a policy . . . whether the Congress has set up a standard for the President's action; whether the Congress has required any finding by the President. . . . So far as this section is concerned, it gives the President an unlimited authority to determine the policy and to lay down the prohibition."

A careful examination of all these cases compels the conclusion that in determining whether or not any particular legislative act is bottomed upon Constitutional legislative standards and is confined within Constitutional boundaries to assure predictable administrative action that is not vague, not unreasonable, not inefficient, not unpredictable, etc., three basic conditions must exist:

(a) The Act must contain a definite statement of policy or purpose.

(b) Congress itself must prescribe definite standards for the administrative guidance.

(c) The Act must prescribe methods to be followed in its administration, by which not only Congress but the courts and the public can determine whether the agency has kept within the limits so prescribed by Congress.

The question then is, do these basic conditions exist with respect to the Renegotiation Act? We submit that none of these basic conditions does exist.

(a) *As to Whether There Is a Definite Statement of Policy or Purpose.*

One will search the Acts in vain for a statement of policy or purpose. The Acts refer to excessive profits. Indeed there may be evils flowing from them. But the Act does not contain a statement of policy or purpose to give body

and content to the term, nor to guide the administrator. Little more need be said in this respect. If, in fact and law, there must exist a statement of policy or purpose, as we contend, it does not exist in the Renegotiation Act.

*Panama Refining Co.* v. *Ryan*, 293 U. S. 388.

(b) *As to Whether Congress Has Prescribed Definite Standards for Administrative Guidance.*

We have urged (pages 25 to 31 hereof) that Congress has not prescribed definite standards for administrative guidance, viz: that Congress has not provided a definition of excessive profits. That statement will not be repeated here, except to recapitulate, that what the Court is here concerned with is the Act of April 28, 1942, and the Act of October 21, 1942. The so-called factors or standards of the Act of February 25, 1944, are not pertinent. Accordingly legislative debates with respect to the 1942 enactments are relevant here.

It is noteworthy that legislative discussions, both on the floor of Congress and in committee hearings, *show a lack of any legislative opinion that efficient and reasonable standards to insure predictable administrative action are contained in the 1942 Acts.* Illustrative of this are the following quotations from the "Legislative Materials compiled for the use of the Committee on Ways and Means of the House of Representatives by Barron K. Grier, Clerk" with Congressional Record paging supplied:

Page 27—Senator Taft: 88 Cong. Rec. 3485

"... and the bill leaves the whole matter in the arbitrary and individual discretion of the Secretaries, without any rule whatever to determine, in the case of each contract, whether a particular contractor has or has not obtained an excessive profit."

Page 89—Representative Cannon: 88 Cong. Rec. 3697

"It leaves it for him alone (the Secretary) to deter-

mine what is fair and reasonable profit and the formula by which he may elect to reach that determination."

Page 92—Mr. Vincent: 88 Cong. Rec. 3698

". . . . It (the 1942 Act) was unacceptable in that it delegated to the various department heads the absolute and unlimited authority to determine what constituted excessive profits, without providing any standards for the insurance of the contractor and the guidance of the department head."

Page 95—Mr. O'Connor: 88 Cong. Rec. 3708

"Now the amendment that has been written into the Bill does anything but this (taking profits out of war). It gives the power to three different departments to fix what is excessive profits. There is no standard provided in the language whereby excessive profits may be determined. What one person may think is excess profits may appear to another to be reasonable. In other words, we are delegating power vested in the Congress of the United States by the Constitution to three different departments to carry out. This is not the proper thing for this Congress to do. . . ."

Page 117—Senator Shipstead and Senator McKellar: 88 Cong. Rec. 3766

Mr. Shipstead: "Then as I understand, decision as to the question of excess profits is left entirely to the conscience of the Secretary. Is that correct?"

Mr. McKellar: "The conscience of the Secretary of War, the Secretary of Navy, or the Chairman of the Maritime Commission."

Mr. Shipstead: "Is it not a fact that the fixing of excessive profits will be done according to the consciences of the various Secretaries?"

Mr. McKellar: "Yes, sir; that is correct."

Page 121—Senator Pepper and Senator McKellar: 88 Cong. Rec. 3767

Mr. Pepper: "Is there anything in the record of either debate in the Senate as the Senator recalls it or in the

discussion of the conferees that indicates anything in the nature of a standard or a principle which might guide the Secretaries in the administration of this proposed law?"
Mr. McKellar: "No, sir."

Page 127—Senator Walsh and Senator Overton: 88 Cong. Rec. 3770
Mr. Walsh: "Let me put it this way: Does the Senator know of any existing law which attempts to determine profit limitations, so that the public and the administrative officials may know what is the line of demarcation between legitimate profits and excess profits?"
Mr. Overton: "There is no law providing any yardstick in that connection."

Page 137—Senator Taft: 88 Cong. Rec. 3774
"It has been admitted that there is no definition in the bill of what constitutes excess profits. . . .
". . . Here is a provision dealing with literally billions of dollars, which is to be operative for years to come, and we cannot on the floor of the Senate agree what it means. . . .
"Whether the provision means granting to the Secretaries arbitrary power, or whether it means nothing, is a subject upon which members of the committee themselves cannot agree. The Senator from Louisiana (Mr. Overton) feels that nothing can be done unless a contract is renegotiated and a new agreement reached with the consent of the contractor. . . .
". . . I agree that the provision is ambiguous. I agree that there are all sorts of possible interpretations. . . .
". . . Any contract might be voided by the Secretary tomorrow, at his discretion. I think that is clear.
". . . There is not the faintest suggestion of a yardstick for excessive profits."

Page 148—Senator Walsh and Senator McKellar: 88 Cong. Rec. 3308. (Referring to Section 403 of the October 21st Amendment)

Mr. Walsh: ". . . Nothing like it had ever before been proposed in a legislative way. It gave the Government the right to amend an obligation which it had agreed upon with a contractor and insist upon the right to renegotiate that contract."

Mr. McKellar: "There is a condition attached—that whenever in the opinion of the Secretary of War, or the Secretary of the Navy, or the Chairman of the Maritime Commission they should find that the prices stated in a contract were excessive."

Mr. Walsh: "That is correct, but it practically gave them unlimited power. . . .

"There were no yardsticks and very few limitations in the extraordinary power granted."

The foregoing quotations may be easily multiplied. It is of striking significance that no Senator or Congressman ever unequivocally voiced the opinion that legislative standards to insure predictable administrative action were present in the Renegotiation Act except Senator McKellar (Legislative Materials, p. 250, 89 Cong. Rec. 6172), and Representative Patman (p. 226, 89 Cong. Rec. 4621). Both had previously stated otherwise (supra).

Upon the foregoing it would appear that it should be assumed that Congress knowingly and deliberately passed legislation lacking in Constitutional requirements; either this, or that some other impulse was present which overrode consideration of the patent unconstitutionality. The record discloses that the patent unconstitutionality, although apparent and realized, was discounted because Congress was of the impression that, in all cases, renegotiation was to be contractually agreed upon between contractors and subcontractors on the one hand and the Government on the other hand. Representative Disney stated (Congressional Record, Vol. 90, p. 10250) that:

". . . Under the amendments recommended by the Committee (referring to the Tax Court) these stand-

> ards do not have to be applied judicially, since the obligation to refund excessive profits is made in all cases a contractual obligation of the contractor. . . ."

So, for instance, Senator Hayden (Legislative Materials, p. 131) said (88 Cong. Rec. 3771):

> "I entirely agree with the Senator (Overton) that, from the legal standpoint, no contract can be renegotiated except as the result of an agreement between the contractor and the Government. . . ."

We have therefore an anomalous situation: Congress passed a statute which in its opinion was unconstitutional if statutorily applied, but the passage of the Act was agreed to because it was of the opinion that renegotiations under its provisions were always to be mutually agreed upon.

Whether renegotiation was to be mutually agreed upon or not may be determined only by the Act. This much is clear; it has not been applied as a matter of agreement; it has been statutorily applied in this cause. This is shown not only by the order itself set forth in the Bill of Complaint (R. p. 1) but is admitted by the Government's Motions for Judgment on the Pleadings and For Summary Judgment by virtue of the Appellants' Fourth Defense (R. p. 13) which sets forth that no "negotiation" took place. The consideration of this defense was foreclosed by the District Court (R. p. 29) on the grounds that it was irrelevant in view of the fact that Appellants did not go to the Tax Court. The point is, however, that the "renegotiation" was not a matter of agreement; and the iniquities of the Acts, clearly seen by Congress in its debates, were fully operative to Appellants' prejudice.

In conclusion, therefore, the Act itself and the legislative materials, show that Congress did not prescribe standards for administrative guidance which permit a legal determination of excessive profits.

(c) *As to Whether the Act Prescribes Methods to Be Followed in Its Administration by Which Not Only Congress but the Courts and the Public Can Determine Whether the Agency Has Kept within the Limits Prescribed by Congress.*

Neither in the 1942 Acts, nor in the Act of February 25, 1944, are there any methods or procedures set forth, which will assure, upon later examination, that action taken thereunder is within the limits prescribed by Congress.

Of course the limits themselves are impossible to ascertain, as the definition of the very basis of the statute, i. e., "excessive profits" is vague and indefinite (see pages 25 to 31 hereof). So even if proper methods and procedures were set forth, they avail nothing if the limits and boundaries upon use of the methods are not stated. Accordingly, for purposes of argument here, one must assume, contrary to the fact of it, we submit, that the ultimate limit, i. e., the definition of excessive profits, of the Acts are properly defined. So, assuming this, what are methods and procedures which will enable Congress, the courts and the public to determine whether the Secretary has kept within the limits prescribed by Congress? We submit that any legislation, under examination in this respect, must provide that the Administrator conform to two requirements, without which the methods and procedures are legally insufficient.

*Firstly*, the legislation must afford a fair hearing. *Secondly*, the legislation must require that the Secretary base his determination upon an adequate finding which must be spread upon the record of the proceedings.

*Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177, 182;
*Morgan* v. *United States*, 304 U. S. 1, 14, 15;
*Ohio Bell Telephone Co.* v. *Public Utilities Co.*, 301 U. S. 292, 300;
*Atchison, T. & S. F. R. Co.* v. *United States*, 295 U. S. 193, 202;

*Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 431;
*Saginaw Broadcasting Co.* v. *Federal Communications Commission*, 96 F. (2d) 554, 559.

The First Act, under which this action is brought (page 12-13 hereof) is barren of any requirements for a hearing. The Act of February 25, 1944, provides for a hearing in the Tax Court, but the Tax Court hearing, upon a determination of the Secretary, is optional for 1942 business (pages 7 to 17 hereof). It follows, therefore, that under the First Act, an adequate hearing would be required at the administrative level of the *Secretary*, but there is no provision requiring it.

The Secretary here purported to grant a hearing (R. p. 5) in advance of making a determination. The implication is that he thought it was necessary, but it is admitted that there was none by virtue of Appellants' Fourth Defense (R. pp. 14-45) and the Government's Motion For Judgment on the Pleadings and For Summary Judgment (R. p. 23). This hearing, however, whether actual or purported, was of no effect, because the determination was in part based upon information secured "from Governmental or other reliable sources" (R. pp. 4-5). Accordingly, there was no hearing in fact.

Likewise, neither of the Acts require adequate findings; and the determination itself (R. p. 3 et seq.) may not serve as such as it is only the ultimate conclusion of the Secretary.

So, inasmuch as the Act itself makes no provision for a hearing or for findings, and inasmuch as there has been no hearing or findings in fact, it follows that the Acts and the determination are unconstitutional, because they do not provide for methods and procedures which will permit Congress, the courts and the public to ascertain whether the Secretary has done his job properly.

(3) THE DETERMINATION THAT APPELLANTS REALIZED EXCESSIVE PROFITS, AND THE JUDGMENT BASED THEREON, CONSTITUTE A TAKING OF APPELLANTS' PROPERTY WITHOUT DUE PROCESS OF LAW, AND A TAKING OF APPELLANTS' PROPERTY FOR PUBLIC USE WITHOUT COMPENSATION.

The issue here is whether the determination of the Secretary, ordering Appellants to pay over money in their possession into the United States Treasury, is a taking of property for public use without compensation and without due process of law, in violation of the Fifth Amendment to the Constitution of the United States. The Fifth Amendment provides:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall property be taken for public use without just compensation."

It is elementary that if there has been a "taking" of private property, just compensation must be made; and that the fixing of the compensation for the taking must be by judicial processes. This is axiomatic, unless, of course, the Constitution is suspended in time of war—which it is not—or unless the Renegotiation Acts operate validly as a taxing measure. The Government contends that the Renegotiation Act is in no sense a taxing measure.

Appellants submit that their property has been taken; that the taking has been wholly without compensation; and that the administrative determination effecting the taking not only has been without judicial process, but if the Government's contentions are correct, Appellants do not have even the ultimate right to a judicial determination upon the administrative action.

(a) *There Has Been a Taking of Appellants' Property.*

The sequence of legally effectual events in the instant case is as follows: (i) Appellants secured certain contracts after competitive bidding (R. p. 4); (ii) Appellants entered

upon the performance of those contracts (R. p. 4); (iii) The Sixth Supplemental National Defense Appropriation Act of April 21, 1942, was passed;* (iv) Appellants received payment upon their contracts; and (v) the Secretary made a determination that Appellants should pay unto the United States Treasurer a certain portion of the proceeds of the contracts received by Appellants.

The proceeds derived from a contract are the property of the contractor. To take, to retake or to "recapture" part of the proceeds amount to one and the same thing: it results in the removing to the possession of the Government something which was previously owned by and in the possession of Appellants. To term this not a "taking" but a "recapture" is a mere play on words. To term the process of removing it from Appellants' possession to the Government's possession as renegotiation, is only a device; it does not change the circumstances of the transaction—that the Government has reached out and taken and appropriated property of Appellants.

To be sure, this may be done in the valid exercise of the taxing power. The Government, however, has always stoutly and vigorously opposed the view that the Renegotiation Act was taxing legislation, as the constitutional infirmities of the legislation are so clear if the Act is so viewed. There is not the uniformity required of tax legislation. In the words of Mr. Patterson, the Under Secretary of War, who made the within determination, it "could not stand" as a taxing measure (Hearings Before House Ways & Means Committee; 78th Cong., 1st Sess. 9/23/43, pp. 848-51) because "there is no doubt about that, it is too broad and too general."

On many considerations the Renegotiation Act does appear to be a taxing revenue measure. A series of conjoin-

* Not all, but the bulk of Appellants' subcontracts, in dollar volume, were dated prior to April 28, 1942.

ing circumstances demonstrates this: (1) Its legislative form has always been in the revenue acts; (2) Only a brief and cursory glance at legislative materials show that in the minds of the legislators they were taxing profits arising out of war business; (3) The ultimate in the administrative side is the Tax Court and, of course (4) The ultimate result of the Renegotiation Act is removing moneys from the pockets of the citizens to the public treasury.

We do not deny that Congress has the power to regulate by a taxing measure, nor do we deny that Congress may not aid the procurement process by a regulatory measure. But if the Renegotiation Act is a taxing measure, it is clearly and abundantly invalid as such. If, on the other hand, it is simply another means of taking property from the citizen unto the Government, no matter what the terminology is, then it must conform to the minimal requirements of due process and the assessment of just compensation. Appellants submit that the force and effect of the Renegotiation Acts is that of a taxing measure; that it is more of a taxing measure than anything else known to the law. If we are correct in this, the Acts are invalid. This, albeit, is one of the reasons why, constitutionally, the policy of the Act must be stated by Congress. Then we would know what it is. But if we are not correct that it is a taxing measure, then certainly there has been a taking of Appellants' property, and the requirements for securing the citizen against a taking must be looked into. This follows.

(b) *No Compensation Has Been Paid upon the Taking of Appellants' Property.*

Valid contracts are property protected by the Fifth Amendment.

*Lynch* v. *United States*, 292 U. S. 571, 579;
*Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106, 123.

A fortiori, the proceeds received or to be received for performance of such a contract belong to the contractor and are likewise property protected by the Fifth Amendment. Appellants here were the owners of the proceeds of certain contracts. These proceeds were received. The Secretary however determined that part of these proceeds should be paid into the public treasury. Is it not obvious that if this is done it will result in Appellants having something less than the proceeds for which they contracted; that is, something less than their property in this contract? If this "something else" ends up in the public treasury, what is the compensation that has been paid for it?

With apprehension that counsel might be accused of over-simplification, it does seem that theories revolving around the point that just compensation is paid if the property owner is allowed reasonable profits, or fair profits, etc., etc., are actually quite beside the point. The issue must be squarely faced. The contracts owned by Appellants, and their proceeds, constitute an integrated "bundle of sticks" as much as a piece of real estate. The Renegotiation Act does not regulate nor control the sticks. It simply says that Appellants must deliver some of the sticks to the Government. If, when the property owner delivers some of his sticks to the Government, the equivalent in value is not paid to him—which it is not—we submit that no compensation has been paid for the taking of his property.

(c). *In Relegating the Appropriation Powers to the Secretary of War There Has Been an Unlawful Encroachment upon the Judicial Power.*

The ascertainment of just compensation is a judicial function.

*Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 327;

*Seaboard Airline R. Co.* v. *United States*, 261 U. S. 299, 304;
*United States* v. *New River Collieries*, 262 U. S. 341, 343.

Even more pertinent is the language in *National City Bank* v. *United States*, 275 Fed. 855, 859; affirmed at 281 Fed. 754; error dismissed, 263 U. S. 726, when it was stated:

> "The executive officers of the Government have no power to fix compensation, nor can the Congress determine by statute what is just compensation. The question is judicial and can be determined only by the courts."

Appellants are entitled to a judicial determination, as required under the Fifth Amendment.

Assuming, for the purposes of argument here, that Appellants are too sanguine and the question of the taking is not as simple as herein stated, still Appellants are entitled to a judicial determination of this. And, as urged in Point 1 hereinabove, Appellants' view of the statute involved actually allows to them a hearing in the District Court for the purpose of making the determination of the compensation to which they were entitled from their contracts. Furthermore, under the Renegotiation Act of February 25, 1944, even though not applicable here, the judicial process is never available to any contractor for the reason that the Renegotiation Act of February 25, 1944, provides in the Tax Court sections [Sec. 403(c) (1) and 403(e) (1)] "that the proceedings of the Tax Court shall be final and conclusive" and "shall not be reviewed or determined by any court or agency."

Accordingly, we submit that here there is attempted taking of Appellants' property; that compensation is not to be paid; and, lastly, that the fixing of that compensation has not been by judicial process. These infirmities render the Act unconstitutional as applied to Appellants' contracts.

Finally, is the Constitution suspended in time of war? We submit that it is not.

War legislation transcending constitutional boundaries in the First World War was stricken down. In *United States* v. *Cohen Grocery Company*, 255 U.S. 81, 88, the Court said:

> "We are of opinion that the court below was clearly right in ruling that the decisions of this court indisputably establish that the mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guaranties and limitations of the Fifth and Sixth Amendments as to questions such as we are here passing upon."

Perhaps a more pertinent explanation is contained in *United States* v. *Schechter Poultry Co.*, 295 U. S. 495, 528. In this case it was urged that the national crisis demanded a broad and extensive cooperative effort by those engaged in trade and industry, and in the event cooperative effort as seen from the executive viewpoint was not forthcoming coercive exercise of Government power was called for. The Court said (p. 528):

> ". . . we are told that the provision of the statute authorizing the adoption of codes must be viewed in the light of the grave national crisis with which Congress was confronted. Undoubtedly, the conditions to which power is addressed are always to be considered when the exercise of power is challenged. Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. *Extraordinary conditions do not create or enlarge constitutional power.* The Constitution established a national government with powers deemed to be adequate, as they had proved to be both in war and peace, but these powers of the national

> government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary. . . ."

In *Home Building & Loan Association* v. *Blaisdell*, 290 U. S. 398, 425, the doctrine is again stated:

> "Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency, and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which have always been, and always will be, the subject of close examination under our constitutional system."

Historically, these cases are bottomed upon firm judicial precedent, for, in *Ex Parte Milligan*, 4 Wall. 2, 120, the Court said:

> ". . . The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. *No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.* Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the Government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority."

The foregoing is not to deny that the war power of the Government is the power to wage war successfully. It is not

restricted to the repulse of the enemy forces in the field. To wage war successfully every phase of the national life must be encompassed. It is not to say, either, that the Government should not insist that the forces of trade and industry be in full production for the benefit of the war effort. What the power to wage war successfully does not approve, however, is indiscriminate, arbitrary and capricious taking of property for public use, with insufficient standards to guide the administrative personnel, and without the uniformity, geographically or otherwise, to sustain the legislative act as a taxing measure. It should also be abundantly clear that neither the morale of the troops nor that of the Nation would have been adversely affected if the statute had been framed so that it would operate surely and uniformly and without discrimination as between persons similarly situated.

## AD HOMINEM

Finally, no excess profits are contained in Appellants' contracts. This was found "beyond a reasonable doubt," we submit, by the courts below. Appellants' contracts were each and all for brick masonry, similar to brick masonry as known in the construction industry for many years (Findings of Fact No. 2, R. p. 26). The costs, percentages of profit and contract prices of such contracts are ascertained, calculated and realized in a manner generally known to all Departments of Government and to the construction industry for many years, and the contracts were entered into upon competitive bidding on the part of the principal contractors, and further competitive bidding on the part of defendants and other masonry subcontractors (Statement of Fact No. 2, R. p. 26). Hence the prices of the contracts as let were the fair and reasonable market prices because they were determined in the manner in which time and experience have shown to be the best means for determining such prices.

Appellants' contract, therefore, could not and did not contain excessive profits.

Respectfully submitted,

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Dated: September 20, 1947.

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No. 1427

105

# In the Supreme Court of the United States

OCTOBER TERM, 1946

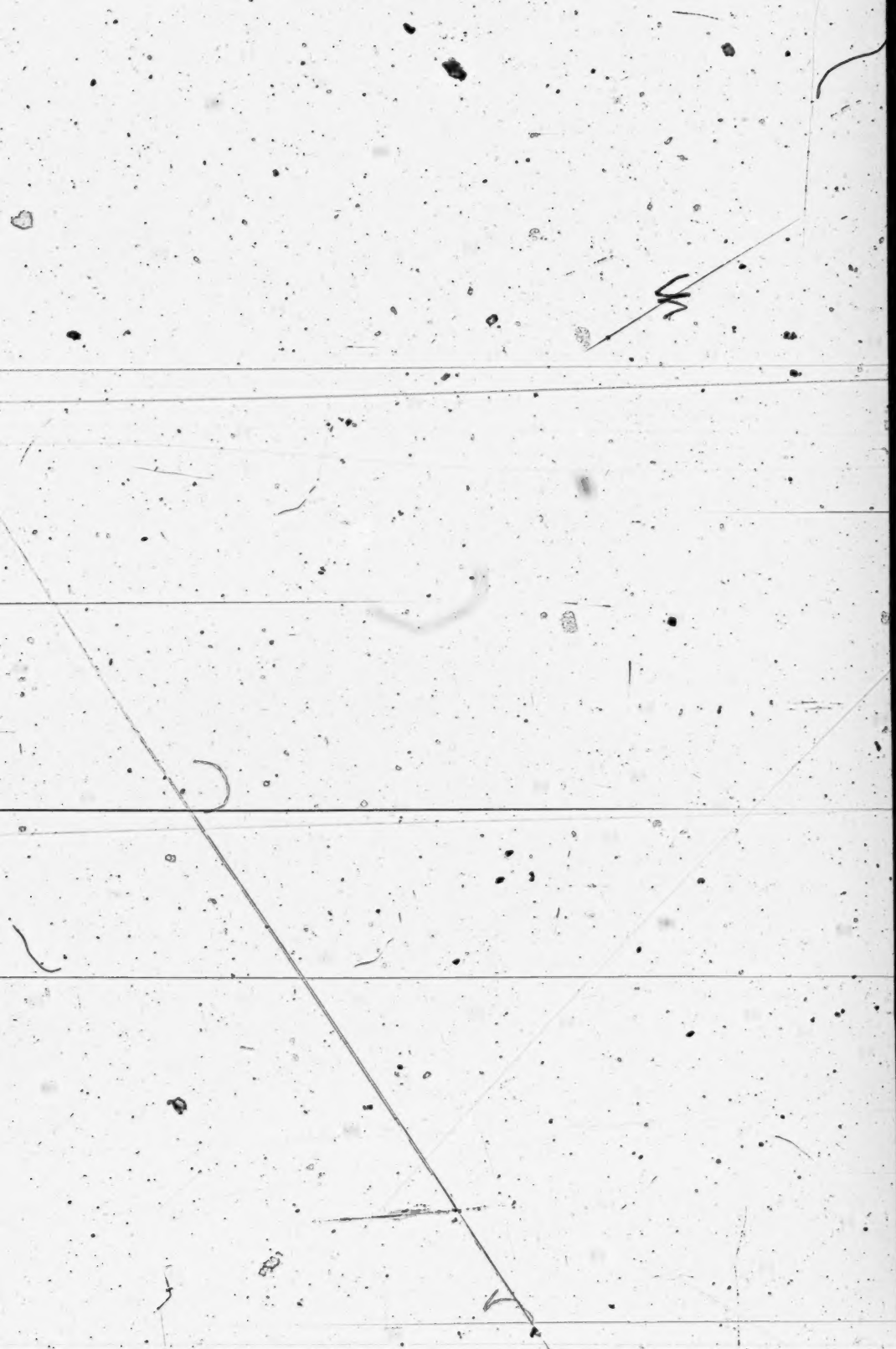
JACOB LICHTER, JENNIE L. LICHTER, INDIVIDUALLY AND AS CO-PARTNERS DOING BUSINESS AS SOUTHERN FIREPROOFING COMPANY, A CO-PARTNERSHIP, PETITIONERS,

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES



# In the Supreme Court of the United States

OCTOBER TERM, 1946

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JACOB LICHTER, JENNIE L. LICHTER, INDIVIDUALLY AND AS CO-PARTNERS DOING BUSINESS AS SOUTHERN FIREPROOFING COMPANY, A CO-PARTNERSHIP, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES

This case presents substantially the same issues of constitutionality and interpretation of the Renegotiation Act[1] as *A V. Pownall, et al.* v. *United States,* No. 1295, this Term, and *Alexander Wool Combing Company* v. *United States,* No. 1391, this Term, pending on petitions for writs of

[1] Sec. 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, 56 Stat. 226, 245, as amended by Sec. 801 of the Revenue Act of 1942, 56 Stat. 798, 982, by Sec. 1 of the Military Appropriation Act, 1944, 57 Stat. 347, by the Act of July 14, 1943, 57 Stat. 564, and finally by Sec. 701 of the Revenue Act of 1943, 58 Stat. 21, 78.

certiorari to the Circuit Courts of Appeals for the Ninth and First Circuits respectively. As in those cases, the suit is by the United States to collect amounts alleged to be owed pursuant to an unappealed determination under the Renegotiation Act that petitioners had made excessive profits on war contracts. For the reasons stated in the Memorandum for the United States in No. 1295, we do not oppose the granting of the writ of certiorari, and we request that, if the writs issue in this case and in Nos. 1295 and 1391, the three cases be set down for argument together.

Respectfully submitted.

GEORGE T. WASHINGTON,
*Acting Solicitor General.*

JUNE 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947

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Nos. 105, 74 and 95

# In the Supreme Court of the United States

OCTOBER TERM, 1947

JACOB LICHTER, JENNIE L. LICHTER, INDIVIDUALLY AND AS CO-PARTNERS DOING BUSINESS AS SOUTHERN FIREPROOFING COMPANY, A CO-PARTNERSHIP, PETITIONERS

*v.*

UNITED STATES OF AMERICA

A. V. POWNALL, GRACE M. POWNALL AND HENES-MORGAN MACHINERY COMPANY, LTD., A CORPORATION, CO-PARTNERS DOING BUSINESS AS GENERAL PRODUCTS COMPANY, PETITIONERS

*v.*

UNITED STATES OF AMERICA

ALEXANDER WOOL COMBING COMPANY, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURTS OF APPEALS FOR THE SIXTH, NINTH, AND FIRST CIRCUITS*

**BRIEF FOR THE UNITED STATES**

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# In the Supreme Court of the United States

OCTOBER TERM, 1947

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No. 105

JACOB LICHTER, JENNIE L. LICHTER, INDIVIDUALLY AND AS CO-PARTNERS DOING BUSINESS AS SOUTHERN FIREPROOFING COMPANY, A CO-PARTNERSHIP, PETITIONERS

*v.*

UNITED STATES OF AMERICA

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No. 74

A. V. POWNALL, GRACE M. POWNALL AND HENES-MORGAN MACHINERY COMPANY, LTD., A CORPORATION, CO-PARTNERS DOING BUSINESS AS GENERAL PRODUCTS COMPANY, PETITIONERS

*v.*

UNITED STATES OF AMERICA

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No. 95

ALEXANDER WOOL COMBING COMPANY, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURTS OF APPEALS FOR THE SIXTH, NINTH, AND FIRST CIRCUITS*

## OPINIONS BELOW

In No. 105, the opinion of the United States Circuit Court of Appeals for the Sixth Circuit (R. 40–46) is reported in 160 F. 2d 329; the findings and conclusions of the District Court of the United States for the Southern District of Ohio (R. 26–31) are reported in 68 F. Supp. 19.

In No. 74, the opinion of the United States Circuit Court of Appeals for the Ninth Circuit (R. 279–283) is reported in 159 F. 2d 73; the opinion of the District Court of the United States for the Southern District of California (R. 196–206) is reported in 65 F. Supp. 147.

In No. 95, the *per curiam* opinion of the United States Circuit Court of Appeals for the First Circuit (R. 241) is reported in 160 F. 2d 103; the opinion of the District Court of the United States for the District of Massachusetts (R. 11–17) is reported in 66 F. Supp. 389.

## JURISDICTION

In No. 105, the judgment of the Circuit Court of Appeals for the Sixth Circuit was entered on March 10, 1947 (R. 39). The petition for a writ of certiorari was filed on May 27, 1947, and granted on June 16, 1947.

In No. 74, the judgment of the Circuit Court of Appeals for the Ninth Circuit was entered on January 29, 1947 (R. 284). The petition for

a writ of certiorari was filed on April 26, 1947, and granted on June 16, 1947.

In No. 95, the judgment of the Circuit Court of Appeals for the First Circuit was entered on March 26, 1947 (R. 241). The petition for a writ of certiorari was filed on May 19, 1947, and granted on June 16, 1947.

In each case, the jurisdiction of the Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTIONS PRESENTED

1. Whether the Renegotiation Act is within the powers granted by the Constitution to the Federal Government.

2. Whether the Renegotiation Act, as originally enacted and as amended, improperly delegates legislative power, and is therefore unconstitutional.

3. Whether the Renegotiation Act is invalid as a "taking" without just compensation or an unlawful "penalty" under the Fifth Amendment.

4. Whether the Renegotiation Act is invalid as applied to profits realized under contracts entered into prior to the Act's effective date.

5. Whether the Renegotiation Act invalidly denies procedural due process.

6. Whether petitioners' failure to petition the Tax Court for redeterminations of the amount of their excessive profits renders the Departmental

renegotiation orders issued against them final on all issues of coverage and amount.

7. Whether, on the assumption that issues of coverage may be examined and determined in the present cases, the renegotiation orders involved here were based on proper constructions of the provisions of the Renegotiation Act concerning contracts and subcontracts subject to renegotiation.

## STATUTES INVOLVED

The original Renegotiation Act (Sec. 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, 56 Stat. 226, 245) and its various amendments (Sec. 801 of the Revenue Act of 1942, 56 Stat. 798, 982; Sec. 1 of the Military Appropriation Act, 1944, 57 Stat. 347; the Act of July 14, 1943, 57 Stat. 564; Titles VII and VIII of the Revenue Act of 1943, 58 Stat. 21, 78; and the Act of June 30, 1945, 59 Stat. 294, 50 U. S. C., App., Supp. V, 1191), with the exception of the 1945 Act, are set forth in a pamphlet entitled "The Renegotiation Act," which is being filed together with this brief, and will be referred to as the statutory pamphlet. The 1945 Act is set forth in the Appendix, *infra*, pp. 146–147.

## STATEMENT

These three cases involve suits by the United States to collect amounts alleged to be owed pursuant to determinations, under the Renegotiation Act, that petitioners had made excessive profits on war contracts. The administrative determina-

tions of excessive profits were all made by the Under Secretary of War in the latter part of 1944, after the enactment of the Revenue Act of 1943, but each petitioner failed to petition the Tax Court for a redetermination of the amount of excessive profits. In Nos. 105 (*Lichter*) and 95 (*Alexander*), the determinations on which suit was brought concerned business done prior to June 30, 1943, and were governed by the original Renegotiation Act, as amended; in No. 74 (*Pownall*), the renegotiated business was done during the calendar year 1943, and the excessive profits determination was governed by the Second Renegotiation Act (Revenue Act of 1943, Title VII). None of the petitioners had contracts directly with a government agency, but all were subcontractors under prime contracts with a renegotiating department; none of their subcontracts reached $100,000 in amount, but in each case the aggregate of war business exceeded that sum. In each instance, the major defense to the Government's claim was the total unconstitutionality of the Renegotiation Act upon its face, and the invalidity of the proceedings leading to the administrative determination; in all three cases, some claim of illegal retroactivity was made but the relevant facts differ materially; a minor defense to each suit was that the petitioners' subcontracts were exempt from renegotiation under the statute because of their size or character. The courts below have all upheld the validity of the Re-

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negotiation Act, and have granted judgment to the United States.

*No. 105 (Lichter)*

The United States instituted this action on May 9, 1945, in the District Court for the Southern District of Ohio to recover judgment against petitioners for $27,019.39, with interest at 6% from November 6, 1944, on account of an unpaid determination under the Renegotiation Act that petitioners had made excessive profits on war subcontracts (R. 1–6). The complaint alleged that, after notice to petitioners, proceedings for the renegotiation of their subcontracts were conducted by representatives of the Secretary of War; that, thereafter, on October 20, 1944, the Under Secretary of War, acting under the Renegotiation Act and in accordance with authority duly delegated to him, determined that during the calendar year 1942 petitioners had realized $70,000 excessive profits on their subcontracts subject to renegotiation; that on the same day the Under Secretary directed petitioners to repay to the Treasury of the United States, on or before November 6, 1944, the amount of excessive profits so determined less the applicable tax credit (amounting to $42,980.61); that no part of the amount of excessive profits so determined had been paid, and that no part of the amount had been withheld or eliminated by any other method (R. 2). It was also

alleged that petitioners had not petitioned the Tax Court of the United States for redetermination of the Under Secretary's determination, as provided in Section 403 (e) (1) and (2) of the Second Renegotiation Act (statutory pamphlet, pp. 37–39), and that the time for filing such a petition had expired (R. 2).

Petitioners' answer (R. 6–22) admitted the making of the Under Secretary's determination as set forth in the complaint (R. 7), the amount of the tax credit (R. 7), the direction to pay the net amount of the excessive profits as determined (R. 7), their refusal to comply, the nonpayment of the demand by withholding or otherwise (R. 8), their failure to petition the Tax Court and the expiration of the period of ninety days allowed by the statute for filing such a petition (R. 7).

As affirmative defenses, petitioners raised a number of issues of constitutional validity and of statutory interpretation. They averred that (1) they were not required to petition the Tax Court because the Under Secretary's determination was invalid and contrary to law (R. 8); (2) their business consisted of constructing brick masonry structures, the costs, profits and prices of which were calculated in a manner generally known in the construction industry for many years and which were not changed by the war emergency (R. 8); (3) the subcontracts here involved were entered into after competitive bidding on the part

of the principal contractors and further competitive bidding by petitioners, and their prices were fair and reasonable and contained no excessive profits (R. 8); (4) no excessive profits were in fact earned during the year 1942 (R. 9); (5) four of the subcontracts involved in the Under Secretary's determination were entered into prior to April 28, 1942, the date upon which the Renegotiation Act was originally enacted, and that Act could not constitutionally be applied retroactively to subcontracts entered into before its enactment (R. 10); (6) seven of the subcontracts were for amounts less than $100,000, and contained no clauses permitting or requiring renegotiation and accordingly were not made subject to renegotiation by the Act (R. 10–11); (7) the under Secretary's determination was erroneous under the original Act because it was based on a lump or group calculation of all of their subcontracts (R. 12), and in so far as the Revenue Act of 1942, approved October 21, 1942 (statutory pamphlet, p. 5), authorized such a lump or group treatment it was invalid as applied to their subcontracts entered into prior to its adoption (R. 13); (8) the Under Secretary's determination was invalid because it was arrived at in an arbitrary manner without according petitioners procedural due process, especially in that the determination was based on undisclosed data (R. 13–16); and (9)

the Renegotiation Act was unconstitutional on its face in that it (a) was an improper taxing enactment, (b) illegally took petitioners' property without just compensation, (c) contained inadequate standards for administrative action, and (d) failed to provide for a proper hearing (R. 16–21).

After answer, the United States moved on August 10, 1945 for judgment on the pleadings and in the alternative for summary judgment (R. 23).[1] Thereafter, petitioners moved to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted and for the reason that the claimed excessive profits were exempt under Section 403 (i) (1) (E) (F) of the Second Renegotiation Act (Revenue Act of 1943, Title VII) (R. 25).

The District Court, after hearing, made findings of fact substantially as set forth in the complaint

[1] Several affidavits were filed in support of these motions. They were not included in the printed record on appeal to the Circuit Court of Appeals but were transmitted to that court in original form. They were not, however, transmitted to this Court along with the printed record. Only two of the affidavits (those of Robert P. Patterson, then Under Secretary of War, and of H. Struve Hensel, then Assistant Secretary of the Navy) are believed to be relevant here and they are identical with the affidavits by Messrs. Patterson and Hensel printed in the records in Nos. 74 and 95, and included in the record in *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752. They deal with the general background of the Act and the necessity for renegotiation.

and admitted in the answer[2] and concluded that there was no genuine issue as to any material fact (R. 26–28). In its conclusions of law, the court sustained the Renegotiation Act against petitioners' attacks on its validity (R. 28–29); in addition, it held that the Tax Court had "exclusive jurisdiction under the statute to determine all questions of law and fact relating to the amount of [petitioners'] excessive profits for the calendar year 1942" (R. 29), and that the failure to seek a redetermination in the Tax Court rendered the Under Secretary's order free from attack on the grounds that (a) a proper hearing had not been allowed, (b) no excessive profits had been realized, (c) petitioners' subcontracts were exempt under the Act, and (d) the subcontracts were renegotiated as a group rather than singly (R. 29–30). Finally, the court held that if it had jurisdiction to pass upon issues of coverage, it would hold petitioners' subcontracts subject to renegotiation and properly renegotiable on a

[2] The business of the Southern Fireproofing Company, petitioners' partnership name, was found by the court to be the "construction of brick masonry structures customarily by subcontracts, a type of work which is in general similar to brick masonry work as it has been known in the construction industry for many years" (R. 26). All of the petitioners' contracts involved in the renegotiation proceedings were found to be subcontracts, obtained by competitive bidding, under prime contracts with a renegotiating Department, awarded as a result of competitive bidding, for the construction of buildings and facilities (R. 26).

group basis (R. 30). Judgment was entered in favor of the United States as prayed for in the complaint (R. 31–32).

On appeal, the Circuit Court of Appeals for the Sixth Circuit affirmed the judgment, holding the Act valid on its face and the petitioners barred from attacking the Under Secretary's determination by their failure to exhaust the Tax Court remedy (R. 41–46).

*No. 74 (Pownall).*

This action was instituted on September 18, 1945, in the District Court for the Southern District of California by the United States to collect the sum of $113,709.19, with interest at the rate of 6% from March 13, 1945, as due and owing from petitioners under a determination that they had made excessive profits on war subcontracts. As amended, the complaint alleged that after proper renegotiation proceedings conducted by representatives of the War Contracts Price Adjustment Board, the Under Secretary of War, acting under the Renegotiation Act and by delegation from the Price Adjustment Board, determined on December 27, 1944, that petitioners had realized $628,373.14 excessive profits during the calendar year 1943, and that the appropriate tax credit amounted to $514,663.95; that on February 26, 1945, the Board notified petitioners that the Under Secretary's order and determination had

been adopted by the Board, and demand was made for payment, before March 13, 1945, of the difference between the determination of excessive profits and the tax credit; that petitioners did not petition the Tax Court for a redetermination and the period for filing such a petition had expired; and that no payment had been made to the United States (R. 2–5, 223–224).

The answer, as amended, admitted that the Under Secretary had made his determination of excessive profits after notice and participation by petitioners (R. 217, 224), and that the Board had adopted his order, that the appropriate tax credit was as alleged, that no petition had been filed in the Tax Court, that the time for filing had expired, and that payment had not been made (R. 16–17). The defenses alleged were that (a) the Renegotiation Act was invalid on its face (R. 11–16),[3] (b) the Under Secretary's order was itself invalid in that it was based on undisclosed data and contained no findings (R. 17–18), and (c) that none of petitioners' contracts exceeded $99,000, and it was therefore exempt from renegotiation (R. 18).

[3] The major grounds of invalidity alleged were that the Act unlawfully delegated legislative power, deprived petitioners of due process, authorized a taking without just compensation, impaired the obligation of private contracts, unlawfully discriminated against petitioners' class, illegally prohibited judicial review, failed to provide for a proper hearing, and invaded the reserved power of the states (R. 11–16).

The United States moved for judgment on the pleadings and in the alternative for summary judgment (R. 19–20). Petitioners likewise moved for judgment on the pleadings and in the alternative for summary judgment (R. 184–185).[4] At the hearing, the parties stipulated that there were no disputed issues of fact (R. 226), and agreed that all of petitioners' contracts were subcontracts and that none exceeded $99,000 in amount (R. 225–226).[5] Only issues of law, *i. e.*, questions of constitutional validity and statutory interpretation, were left for decision.

The District Court denied the motions of both parties (R. 195) and "ruling on the merits of the cause" ordered judgment as prayed by the United States (R. 195–196, 205–206). The court found the facts substantially as alleged in the complaint and as stipulated (R. 206–208), held the Act valid on its face (R. 197–205), and the unappealed excessive profits determination to be final (R. 196). Judgment was entered in favor of the United States in the sum of $121,043.39 (R. 210).

[4] The United States filed the Hensel (R. 104–184) and Patterson (R. 22–104) affidavits referred to in footnote 1, p. 9, *supra*. Petitioners filed affidavits of A. V. Pownall (R. 187–193) and F. M. Morgan (R. 193–195) giving information as to the business of General Products Company and the petitioners.

[5] The business of General Products Company, petitioners' partnership name, was apparently the production of precision parts, machinery, and tools for use by other war contractors (R. 187–190, 194).

The Circuit Court of Appeals for the Ninth Circuit affirmed the judgment (R. 284). It followed its earlier decision in *Spaulding* v. *Douglas Aircraft Co.*, 154 F. 2d 419, in upholding the constitutionality of the Act (R. 280–281), and held that questions of coverage were for the Tax Court, which could not be by-passed (R. 281–283).

*No. 95 (Alexander)*

This case was likewise commenced by the United States to recover from the petitioner the sum of $15,882.78 (together with interest at 6% from September 6, 1944) which was due and owing on an excessive profits determination. As in the other actions, the complaint (R. 1–7), filed on August 9, 1945, in the District Court for the District of Massachusetts, alleged that, after notice to the contractor and proceedings had for the renegotiation of petitioner's contracts and subcontracts, the Under Secretary of War duly determined on September 6, 1944, that petitioner's profits on renegotiable contracts and subcontracts were excessive in the amount of $22,500 for its fiscal year ending June 30, 1942, and in the sum of $45,000 for the fiscal year ending June 30, 1943 (R. 2); that the tax credits to which petitioner was entitled were $15,020.80 and $36,596.42 for the respective fiscal years (R. 2); that the Under Secretary's orders directing petitioner to pay the net balance were mailed on September 6,

1944 (R. 2); that petitioner had never requested the Tax Court for a redetermination of the Under Secretary's orders and the period for filing such a petition had expired (R. 2–3); that the petitioner had not paid, and the United States had not collected, any of the balance of $15,882.78 owing to it (R. 3).

Petitioner's answer (R. 7–9) admitted the factual allegations of the complaint but denied that any amount was owing to the United States, and averred that the Under Secretary's orders were null and void for the following reasons: (a) petitioner never contracted with the United States and none of its private contracts contained a provision requiring renegotiation; (b) as applied to petitioner, the Renegotiation Act was unconstitutional;[6] and (c) the Under Secretary's orders were made without due process of law.[7]

The United States then moved for judgment on the pleadings, or, in the alternative, for sum-

[6] The Act was alleged to delegate legislative power unlawfully, to deprive petitioner of property without due process, to take petitioner's property for public use without just compensation, and to exceed the powers delegated to the Federal Government.

[7] In this connection, it was alleged that the orders were based on undisclosed and secret data; and that they did not contain any sufficient findings of fact; that they were based not on government contracts but on work performed by petitioner upon wool, a substantial part of which was ultimately used by others in the manufacture of articles sold to a renegotiating agency.

mary judgment (R. 9–10). In support of these motions the Government filed the affidavits of Robert P. Patterson and H. Struve Hensel referred to above, *supra*, pp. 9, 13; of Colonel Maurice Hirsch, then Chairman of the War Contracts Price Adjustment Board, setting forth general administrative practices in the renegotiation of subcontracts (R. 102–112); of Major Ralph G. Lucas, relating to the renegotiation proceedings prior to the issuance of the instant orders concernig petitioner's profits (R. 112–115); of G. Lyle Belsley, of the War Production Board, relating to petitioner's application for priorities with the War Production Board; and of Lt. Col. Albert W. Tolman, Jr., setting forth the dates and other data with respect to certain contracts listed in petitioner's WPB priority applications as among those for which petitioner was engaged in producing.[8]

From these affidavits it appears that petitioner, which is engaged in the business of combing its customers' grease wool into tops and noils on a commission basis, was requested to submit its own figures as to the portion of its business which it considered to be renegotiable (R. 113). Petitioner stated that its records did not disclose the exact end use of the wool combed by it but submitted its customers' estimates as to the per-

[8] The Belsley and Tolman affidavits were not printed in the record, but were transmitted in original form to the Circuit Court of Appeals (R. 239).

centage of their wool used in the performance of renegotiable contracts, and contended that these percentages should be reduced by 11% for wastage in subsequent manufacture (R. 113–114). Petitioner's figures were accepted by the renegotiation officials except for the rejection of the percentage reduction for wastage (R. 113–115). For its part, petitioner filed an affidavit by A. I. Alexander (R. 231–236; cf. R. 34–35), its president (R. 20), who stated that usually but not always the company knew the destination of the wool it combed on commission (R. 233), that the textile mills which purchased wool processed by petitioner customarily carried inventories and used wool combed by petitioner, along with that obtained from other sources, for military or civilian contracts, according to the mill's requirements at the time (R. 233–234), and that petitioner did not know at the time of making delivery whether these mills had existing government contracts for which wool combed and shipped by petitioner was required or subsequently used (R. 234). Mr. Alexander testified to the same effect in open court (R. 20–34, especially R. 28–32).[9]

The District Court found that petitioner "had no direct contracts with any department or

[9] The contractor had previously certified that its entire production of wool tops was for the "United States Army and United States Navy fabric" (R. 30). The details of these certificates are set forth in the Belsley affidavit, not printed in the record. See also R. 29–32.

agency of the United States. It combed wool for different private companies. It knew that some of the wool it combed for the companies was destined for use in Government contracts, but it was and is ignorant as to the destination of other wool" (R. 13). The court held for the United States on the grounds that the Congress has power to recapture excessive profits under the federal war powers (R. 14); that the Renegotiation Act does not delegate legislative authority, the standard of "excessive profits" being sufficient in wartime legislation (R. 15); that any defects in the War Department proceedings were immaterial in view of the opportunity afforded the petitioner for a trial *de novo* and redetermination in the Tax Court (R. 15–16); that the remaining defenses, *i. e.*, coverage of petitioner's subcontracts and retroactivity of the Act's application to petitioner, were not available because of the failure to invoke the Tax Court's jurisdiction (R. 16–17). Judgment was entered as prayed in the complaint (R. 10–11).

The Circuit Court of Appeals for the First Circuit affirmed the judgment "upon the grounds and for the reasons" set forth in the District Court's opinion (R. 241).

## SUMMARY OF ARGUMENT

I. In these collection suits by the United States, the Government does not challenge petitioners' right to contest the validity of the Re-

negotiation Act on its face, but maintains that the Act, examined in the light of its background and history, is wholly valid.

A. With the coming of war to the United States in December 1941, the war agencies and the country's industries faced an enormous procurement problem. At once, the volume of contracting for military and naval purposes sharply increased and continued to rise, at accelerated pace, far beyond any previous experience; speed in obtaining supplies became all-important; a host of major and minor difficulties and problems, peculiar to wartime production, beset both the war procurement agencies and their contractors; speed, volume, change, and unforeseeable fluctuation were the dominant characteristics of the program. In these circumstances the peacetime system of competitive bidding was largely useless and individual negotiation had to be substituted. But under these same wartime conditions contractors could not, and would not, quote forward fixed prices which were not high enough to cover many conceivable cost contingencies, a large number of which might never come to pass. On the other hand, the war procurement agencies held the fixed price contract to be far superior to alternative methods of contracting, since it furnished financial incentives to the husbanding of scarce labor and materials, and the reduction of costs; cost-plus forms of contract and escalator

clause devices not only failed to offer these incentives but also required extensive time and manpower consuming audits. The inevitable result of using the fixed price form in these circumstances was the growing accumulation of inordinate profits, which began to be of substantial concern in the winter and spring of 1942. Voluntary renegotiation of contract prices was carried on with some responsible contractors, but this remedy was obviously inadequate; and no judicial remedy was available, as *United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289, decided in February 1942, made clear. The traditional legislative means of control were all deemed defective by the Executive. Limited excess profits taxes left margins for too substantial war profits, and the rigid 100% form had the effect of putting all war production on a cost-plus basis; price ceilings were similarly unavailing; and profit limitation statutes, of the Vinson-Trammell type, were found to hinder war production and clog efficient production. The Services and the War Production Board strongly opposed all such measures, and repeatedly pointed out their defects to the Congress. Stress was laid upon the retention of incentives to efficiency obtainable through the fixed-price contract, and upon the varied factors, such as volume, turnover, and risks incurred, which should in fairness govern a contractor's profit rate. These agencies sug-

gested to Congress that the preferable legislative measure would give statutory authorization to the renegotiation of fixed contract prices, which had already been undertaken voluntarily with some contractors.

Congress, which was insistent on adopting some measure to curb excessive wartime profits, carefully considered both a fixed percentage (6%) profit limitation, and also a sliding scale percentage (2% to 10%) system, but finally decided, as the war agencies had done, that such fixed standards could not properly be adopted, and that the great need was for flexibility. Accordingly, the first Renegotiation Act, with its provision for renegotiation of "excessive profits," was enacted in April 1942. The operation of this statute was thereafter subjected to thorough and continuous supervision by Congress and its committees for over four years; it was five times amended; its merits and defects were extensively debated in Congress and by the interested public; but its basic structure was retained despite attack and after full legislative review. In the first five years of its operation, from April 28, 1942, to June 30, 1947, the Act resulted in direct recapture of excessive profits amounting to some $10,500,000,000 gross and $3,130,000,000 net (after tax adjustment). About 95% of the renegotiated contractors entered into bilateral agreements deter-

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mining their excessive profits, and in only some 5% of the cases was it necessary for the renegotiating agency to enter a unilateral order.

B. The federal war powers clearly authorize Congress to recapture excessive profits realized under war contracts.

C. Neither the first nor the second Renegotiation Act unlawfully delegates legislative authority to administrative agents.

1. In the light of the background and purpose of the Act, the term "excessive profits," in the original Act, is a sufficient standard or general rule for the determination of particular cases by the renegotiating agencies or the Tax Court. The policy and direction available to guide these administrators are at least as specific and definite as those supplied by other single-phrase standards in peacetime legislation which has been upheld by this Court, *e. g.* "public interest," "just and reasonable rates," "unreasonable obstruction to navigation," and "fair and reasonable rent." The instant standard, comprehensively read in its context, also compares favorably with those statutes specifying multiple factors for administrative consideration.

Valid when thus tested by normal peacetime precedent, the original statute is certainly supportable if, as may be the case, broader delegation is permissible in war legislation or in statutes dealing with Government procurement.

2. In any case, when the Renegotiation Act was amended on October 21, 1942, July 1, 1943, and February 25, 1944, Congress had full knowledge of the basic criteria previously formulated and used in the administration of the Act, which were substantially identical with those legislatively specified in the Second Renegotiation Act of February 25, 1944. When the Under Secretary of War issued the instant excessive profits determinations in the fall of 1944, the standard of "excessive profits" had received comprehensive legislative definition.

3. The Second Act, which expressly lists seven factors for consideration in determining excessive profits, plainly satisfies all constitutional requirements concerning delegation.

D. The recovery of excessive profits by renegotiation does not constitute a "taking" within the meaning of the Fifth Amendment. Renegotiation, like price control, is an exercise of the regulatory powers of Congress; and like income or excess profits taxation, the recapture of excessive profits is not governed by the "taking" clause of the Fifth Amendment. Nor is the Under Secretary's order an unlawful "penalty," violative of that Amendment.

E. The Act is valid as applied to profits realized under contracts entered into prior to April 28, 1942, the statute's effective date. Since some $50,000,000,000 of war contracts were out-

standing at that time, Congress reasonably considered it necessary and advisable, in its program for the control of war profiteering, to include profits realized under all wholly or partially executory agreements. The consistent line of this Court's decisions proves that the Constitution does not prohibit such reasonable retroactive legislation with respect to the private contracts involved in these cases. In particular, the settled validity of retroactive income taxation establishes the propriety of reaching back to recapture excessive profits. The same reasons sustaining the Act's application to prior private contracts support its retrospective application to government agreements (none of which are presented here).

F. The Act does not deny petitioners procedural due process of law. Petitioners had the right to a full *de novo* hearing and redetermination by the Tax Court, and that hearing, even though it follows the issuance of the initial renegotiation order, satisfies all constitutional requirements. Whether the Under Secretary granted petitioners a full hearing, made the proper findings, or improperly considered undisclosed evidence, is therefore wholly immaterial. Any such defects could have been corrected in the Tax Court. The availability and extent of judicial review of Tax Court redeterminations need not be decided in these proceedings, since petitioners, having failed to take advantage of that remedy, cannot complain of the absence of judicial review.

II. Petitioners' failure to petition the Tax Court for a redetermination renders the Under Secretary's orders final on all issues of coverage and amount. As this Court has twice held (*Macauley* v. *Waterman Steamship Corp.*, 327 U. S. 540; *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752), the Tax Court is, at least, the exclusive initial forum for determining whether a war contractor's agreements are subject to renegotiation and the amount of his excessive profits. Contrary to petitioners' contention (Nos. 95 and 105), the Act does not permit contractors with renegotiations for fiscal years ending prior to July 1, 1943, to choose between a Tax Court redetermination and some sort of review or *de novo* proceeding in a District Court. The Tax Court is the exclusive original forum for reconsideration of all Departmental determinations; on familiar principles of exhaustion of administrative remedies, as well as the structure and purpose of the Act, it is plain that petitioners' failure to pursue this statutory remedy now bars all challenge to the Under Secretary's orders on issues of coverage and amount. Petitioners would not have forfeited any of the constitutional rights they now assert by proceeding in the Tax Court, and there is no other excuse for their failure.

III. Even if questions within the exclusive original jurisdiction of the Tax Court may be decided in these proceedings, the Under Secretary's orders were based on proper interpretations of the

Act. Petitioners' subcontracts were usually for amounts of less than $100,000, but in each case they aggregated more than that sum, and the statutory language, history, and practice leave no doubt that in these circumstances subcontracts for less than $100,000 are renegotiable, and may be renegotiated as a group. The terms of the statute are also clear that petitioners' subcontracts (in No. 105) are not automatically exempt from renegotiation merely because they were subcontracts under prime construction contracts, all awarded after competitive bidding. Finally, petitioners' agreements (in No. 95) were all subcontracts within the meaning of the original Act, and any doubt as to this coverage was removed by the retrospective legislative definition of "subcontract" in the Act of October 21, 1942.

## ARGUMENT

*The statute; basic provisions:*

The Renegotiation Act was originally enacted on April 28, 1942, as Sec. 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, 56 Stat. 226, 245. It has been amended several times (see statutory pamphlet, pp. 5, 15, 16, 18), but the core of its structure has remained constant. The prices or income from contracts and subcontracts with certain named departments (including, from the beginning, the War and Navy Departments and the Maritime Commission), are author-

ized and directed, with certain exemptions, to be renegotiated, by agreement or by unilateral order, so as to eliminate excessive profits, and power was granted to the renegotiating agencies to withhold or recover the amount found to represent such excessive profits, whether or not the contracts or subcontracts contained a recapture or renegotiation clause; future contracts with these Departments exceeding $100,000 in amount were directed to contain a provision for renegotiation and for retention by the United States of excessive profits or for repayment of such profits to the United States, as well as a provision requiring prime contractors to insert similar clauses in subcontracts of like amount; some provision was made as to the costs and other expenditures to be taken into account, and authority was granted to use the subpoena power provided by Title XIII of the Second War Powers Act, as well as the right to demand further information from contractors; and the Act was made applicable to existing contracts on which final payment had not been made prior to April 28, 1942.

*Amendments.*

By Section 801 of the Revenue Act of 1942, 56 Stat. 798, 982, approved October 21, 1942, the Treasury Department was retrospectively added to the list of Departments whose contracts were covered, and the Act was reenacted with clarify-

ing amendments, the most significant of which stated expressly that a contractor's agreements might be renegotiated as a whole, explicitly defined the term "subcontract," and made it indisputable that the excessive profits of an unwilling contractor might be determined by unilateral order. By the Military Appropriation Act, 1944, 57 Stat. 347, approved July 1, 1943, it was expressly provided that the contracts of the Reconstruction Finance subsidiaries (Defense Supplies Corporation, Defense Plant Corporation, Metals Reserve Company, and Rubber Reserve Company) were subject to renegotiation. Agreements of contract brokers were explicitly dealt with by the Act of July 14, 1943, 57 Stat. 564, in order "to prevent the payment of excessive fees or compensation in connection with the negotiation of war contracts."[10] On February 25, 1944, the Renegotiation Act was entirely revised and reenacted as Titles VII and VIII of the Revenue Act of 1943, 58 Stat. 21, 78, and the right to a Tax Court redetermination *de novo* of the amount of excessive profits was granted with respect both to previously issued and to future administrative orders; the Act's termination date was set at December 31, 1944, or, if the President so proclaimed, not later than June 30, 1945. Cf. Farrand, *The Renegoti-*

[10] None of the instant cases concerns contracts with the R. F. C. or its subsidiaries, or contract brokers' agreements.

*ation Legislation* (1944), 44 Col. L. Rev. 216; Steadman, *A Further Legal Inquiry Into Renegotiation,* I (1944), 43 Mich. L. Rev. 1. On November 16, 1944, by Proclamation No. 2631 (9 Fed. Reg. 13739), the President, acting under this authority, extended the Act's termination date to June 30, 1945. Finally, by the Act of June 30, 1945, 59 Stat. 294, Congress again extended the Act's period of operation to December 31, 1945, at the latest.

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The United States contends that (a) on its face the Renegotiation Act, as originally enacted and as amended, is a constitutional exercise of the powers of the Federal Government, (b) that, if the issue be properly here, the Act validly applies to those of petitioners' subcontracts which were entered into before April 28, 1942, or prior to the dates of the various retrospective amendments to the Act, and (c) that petitioners' failure to petition to Tax Court for a redetermination *de novo* of the Under Secretary's determinations precludes consideration of the coverage and other statutory objections to the validity of the determinations, as well as of any procedural objections to the administrative Departmental proceedings. We shall also show that, in any event, the Under Secretary's determinations rested upon proper constructions of the coverage of the Act.

## I. THE RENEGOTIATION ACT IS CONSTITUTIONAL ON ITS FACE

In contractors' actions in equity to enjoin the making or enforcement of an excessive profits determination, either in the absence of a petition for redetermination in the Tax Court or during its pendency, the Government has urged the impropriety of judicial decision on the validity or construction of the Renegotiation Act. *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540; *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752; *Wade* v. *Stimson*, 331 U. S. 793; *Knowles* v. *Hirsch*, 65 F. Supp. 690 (D. C. D. C.); *Lincoln Electric Co.* v. *Forrestal*, D. C. D. C., decided July 14, 1947, pending on appeal, No. 320, this Term. But in the instant collection suits by the United States, instituted after the contractor's right to a Tax Court redetermination has been forfeited, the Government does not contest the right of the courts to decide issues of the validity of the Act on its face. Cf. *Yakus* v. *United States*, 321 U. S. 414. But we believe such defenses to be baseless.

The Renegotiation Act has been sustained as a lawful exercise of Congressional power by every court, including the Tax Court, which has passed upon contentions of constitutional invalidity. *Spaulding* v. *Douglas Aircraft Co., Inc.*, 154 F. 2d 419 (C. C. A. 9); No. 74, R. 196–206, 65 F. Supp. 147 (S. D. Cal.), affirmed, R. 279–283, 159 F. 2d 73 (C. C. A. 9); No. 95, R. 11–17, 66 F. Supp. 389 (D. Mass.), affirmed, R. 241, 160 F. 2d 103; No. 105, R. 26–31, 68 F. Supp. 19 (S. D. Ohio), affirmed, R. 40–46, 160 F. 2d 329 (C. C. A. 6); *Stein Brothers Mfg. Co.* v. *Secretary of War*, 7 T. C. 863, September 26, 1946; *Ring Construction Corp.* v. *Secretary of War*, 8 T. C. 1070, May 15, 1947. Examination of the Act in the light of its background proves that these lower courts did not err.

### A. THE BACKGROUND OF THE RENEGOTIATION ACT

The considerations which prompted the enactment of the Renegotiation Act were summarily set forth by the Special Committee Investigating the National Defense Program (the "Truman Committee") in its report of March 30, 1943.

The Report stated (S. Rept. No. 10, Pt. 5, 78th Cong., 1st Sess., p. 218):

> As to the necessity and desirability of the renegotiation law:
>
> (1) Because of the wartime need for rapid procurement of materials of war, new materials with which there has been no previous manufacturing experience and other articles previously manufactured only in relatively small quantities, some procedure for subsequent price adjustment is necessary and desirable if excessive war profits and costs are to be avoided.
>
> (2) Taxes alone will not do the job because (a) higher corporate tax rates are likely to encourage higher costs and discourage economical production; (b) no scheme of taxation has been devised which is sufficiently flexible to provide an incentive for efficient low-cost production; (c) a profit percentage which would fairly reward one war contractor with one type of financial structure would bankrupt a second contractor with a different financial set-up, and would provide inordinately excessive profits for a third contractor with a still different financial problem.
>
> (3) War contractors in most cases can protect themselves against loss by escalator clauses and other contract provisions for contingencies. The people can obtain protection in many cases only through some procedure such as renegotiation.
>
> (4) Experience has shown "cost plus" contracts to be worse than worthless in the

effort to prevent excessive costs. They strongly tend to increase costs instead of the reverse.

The necessity for renegotiation is developed more fully in the extensive affidavits of Robert P. Patterson (No. 74, R. 22–104; No. 95, R. 119–176), formerly Secretary of War and Under Secretary of War in charge of procurement, and of H. Struve Hensel (No. 74, R. 104–184; No. 95, R. 177–231), then Assistant Secretary of the Navy in charge of procurement and formerly Chief of the Procurement Legal Division and General Counsel of the Navy Department. These affidavits, and the excerpts from the Committee hearings and reports and from the Congressional debates set forth in the pamphlet on "Legislative History of the Renegotiation Act", filed herewith, present a full statement of the problems which led to the enactment of the Renegotiation Act.

In summary form, the controlling factors disclosed by these affidavits and legislative records were these:

1. *Scope of the wartime procurement problem: a. The volume of contracting:* The attack on Pearl Harbor brought to the United States a procurement problem of even more gigantic proportions than that of the active national defense period. To supply the needs of our own armed forces and those of our allies required an immense and immediate acceleration of all phases of industrial production to reach previously

inconceivable procurement goals (Patterson affidavit, pars. 4, 10, 11). In the first half of 1942, the War Department's procurement activity increased roughly four times over that in the last six months of 1941, and the Navy Department's over three times. By June 30, 1942, the outstanding obligations of the War Department for war purposes amounted to nearly $43,000,000,000, and the Navy's commitments amounted to at least half that amount. The total expenditures of both services for the 1942 fiscal year amounted to nearly $23,000,000,000, exceeding the total military and naval expenses of the United States from 1789 through the end of World War I (Patterson affidavit, par. 12, Exh. A; Hensel affidavit, par. 7–11). The volume of production demanded of American industry, and of each war supplier, was totally unlike any other experience.

b. *The stress on speed in procurement:* In wartime, it is axiomatic that speed in procurement takes primary place and nothing can be allowed to delay the quick and continuous production of supplies for combat troops and their auxiliaries. Cf. *Aircraft & Diesel Equipment Corp.* v. *Hirsch,* 331 U. S. 752, 770; Patterson affidavit, pars. 4, 10.

c. *Other special difficulties of wartime production* (Patterson affidavit, pars. 4–5, 13–16; Hensel affidavit, pars. 15–68): In addition to the major problems posed by the tremendously increased demand and by the emphasis on continued accelera-

tion of the procurement program, acute difficulties arose out of the conditions inherent in the carrying on of a total war against ruthless and resourceful enemies. There was an unrelenting demand for the development and production of new weapons and supplies of all types, and for the utilization of materials and techniques previously untried. Constant streams of changes in specifications and design, in the course of performance of individual contracts and also between successive contracts for similar items, resulted from the test of actual performance, from the steady development of new combat techniques, from shifts in combat areas and types of warfare, and from the ingenuity of engineers and production planners. The rapid wholesale conversion of peacetime industrial facilities to war work, and the burden of manufacturing supplies often utterly dissimilar to the producer's normal products, meant the abandonment of previous experience as a guide, as well as the frequent emergence of unexpected production difficulties. Labor shortages, rising wages, the need to train the unskilled and to retrain old workers, added other large factors of uncertainty; especially pressing was the insistent need for adequate production and engineering personnel to increase efficiency and cut performance time. Material bottlenecks and shortages likewise created enormous problems both for the Services in scheduling their procurement programs and

for the individual producer in fulfilling his commitments. And to these major difficulties there accumulated a host of minor problems such as the securing of adequate financing, the disruption and shortage of transportation facilities and the procurement of tools and production equipment.

2. *The impossibility of accurate forward pricing* (Patterson affidavit, pars. 5, 14–19; Hensel affidavit, pars. 6–7, 15–68): In these circumstances, the war procuring agencies could not rely on the normal peacetime methods of procurement. Competitive bidding was too slow, too inflexible, and entirely unsuitable to a situation in which even marginal producers had to be used and real competition could not exist. Direct negotiation was early substituted (beginning in July 1940 and progressively thereafter), but although it expedited procurement it could not assure accurate pricing in advance of performance. All the uncertainties outlined above, every potential change in circumstance, necessarily affected the figure which the contractor would accept or the Government offer. On the one hand, possible changes in specifications or increased labor costs, for example, would fairly require the setting of higher prices; on the other, the successful training of labor, mastering of novel manufacturing problems and the achievement of mass production, might ultimately lead to a sharp decline in unit

cost after full or partial performance. What would be the final result of the interplay of these and the other factors in terms of ultimate cost and of a fair advance price could only be a matter of largely unguided speculation. It was quite natural that contractors, faced with such uncertainty, would not quote forward lump sum prices unless the amounts were set high enough to cover many conceivable contingencies, a substantial number of which might never be realized. Cf. *United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289, 301–302. In the flux of wartime conditions and faced with the impossibility of gauging costs for itself, a procuring agency could not validly deem such a position to be unreasonable.

3. *The inadequacy of alternative contracting methods* (Patterson affidavit, pars. 6, 15, 17–19; Hensel affidavit, pars. 79–81, 100, 102–122): The great superiority of the forward fixed-price contract, in the Services' view, lay in its financial incentive to efficiency of operation, leading to reduction in costs, and the husbanding of scarce labor and materials. The savings flowing from proper forward pricing were believed to be immense in dollars and of even more significance in the increasing availability of men and supplies. Alternative contracting devices did not offer these prospects. The cost-plus-a-fixed-fee contract was used where unavoidable, but although limiting

profits it provided no financial incentive to control costs, which make up the bulk of total expense to the public; moreover, the auditing required by this contract form imposes a heavy burden on both parties and consumes inordinate amounts of valuable expert manpower and of time. Escalator clauses, permitting price adjustment in accordance with fluctuations in indices of labor and material prices, likewise require extensive auditing and could not be used for many labor and material costs subject to drastic changes, against which contractors insisted on protection by the inclusion of contingencies in the contract price. Aside from its other potent disadvantages, a mandatory order under Section 9 of the Selective Training and Service Act of 1940, 50 U. S. C. App. 309, would be tantamount to some sort of statutory cost-plus contract.

4. *The resulting accumulations of excessive profits:* The effect of using fixed price agreements in the uncertain conditions of wartime production was bound to be the accumulation of excessive profits on a large scale, unless the parties could agree upon continued readjustment of contract prices. Many producers recognized this to be so, and the Patterson and Hensel affidavits demonstrate the Government's actual experience from 1940 through the war years (Patterson affidavit, pars. 16, 20–30; Hensel affidavit, pars. 39–68, 69–90). The Navy's findings are illustrative (Hensel affidavit, pars. 40–68). The total con-

tract price on a group of thirteen contracts executed during 1940 and 1941 by the Bureau of Ships was approximately $750,000,000; total actual cost was about $515,000,000 and the profit, absent renegotiation, would therefore have been 45.7% of cost. This is without regard to the provision for escalation which, had it been given effect, would have added an additional 15% of profit. Early in 1942, the cost of a destroyer escort was estimated at $3,300,000; actual cost varied from $1,500,000 to $2,500,000, and, under one contract which fixed the price at $3,500,000, the cost was $1,800,000, or a profit in the absence of renegotiation of 93.4%. A manufacturer holding a contract for 200 destroyer turbines produced the first turbine at a cost of $2,559,000; the cost of the sixteenth turbine was about $607,000. These significant examples could be multiplied many score (see, *e. g.* Patterson affidavit, pars. 15–16).[11]

No one could countenance leaving untouched the accumulation of excessive profits which would

[11] For those contractors whose speculative forward pricing resulted in losses rather than excessive profits, relief was later made available by the war procurement agencies, in certain categories of cases, under Title H of the First War Powers Act, 1941 (Act of December 18, 1941, c. 593, 55 Stat. 839, 50 U. S. C. App., Supp. V, 611), and Executive Order No. 9001, December 27, 1941. See Rowley, *The First War Powers Act Cases*, appearing in Shepherd, *Cases and Materials on the Law of Contracts* (2d ed. 1946), pp. 1233–1238; Kramer, *Extraordinary Relief for War Contractors* (1945), 93 U. of Pa. L. Rev. 357; and Fain and Watt, *War Procurement—A New Pattern in Contracts* (1944), 44 Col. L. Rev. 127, 194 *et seq.*; cf. 40 Op. Atty. Gen., No. 53, August 29, 1942.

inevitably grow fantastically as war procurement accelerated in tempo, coverage, and amount. The waste of public funds and the increase in the public debt would be enormous. The dikes against inflation would be seriously weakened. A large crop of war millionaires would again be created. Excessive accumulations of profit would lessen incentives to continuing efficiency and provide a cushion for wasteful production. Above all, it was obvious that the morale of the men and women in the forces, and of war workers, would be gravely undermined by the knowledge that, once again, some were profiting inordinately from a war in which others were serving and dying (cf. Patterson affidavit, par. 23).

5. *The inadequacy of voluntary renegotiation:* Especially after the declaration of war, the armed services and responsible business leaders recognized the seriousness of the dilemma, and some steps were taken to solve it by voluntary renegotiation. Several leading contractors welcomed the opportunity to return "embarrassing" excessive profits, and plans were made for voluntary price adjustment boards in the War and Navy Departments (Patterson affidavit, pars. 7, 22, 24–30; Hensel affidavit, pars. 75–76, 80–90; Legislative History pamphlet, pp. 50–67). But the amounts actually recovered, although substantial, were only a fraction of the excessive profits realized. And the refund practice, as long as it remained on a voluntary basis, inevitably penal-

ized cooperative contractors. It was very doubtful whether even the fairest of suppliers could indefinitely continue making refunds while his less patriotic competitor accumulated reserves of excessive profits to strengthen his position in the highly competitive postwar market.

6. *The lack of an available judicial remedy:* A retrospective judicial remedy against contractors unwilling to renegotiate on a voluntary basis, to be utilized after the war, could not serve adequately to police the entire field of war contracting. But in February 1942 it became clear that such a remedy, for whatever it might be worth in individual cases, was not even available. In *United States* v. *Bethlehem Steel Corporation,* 315 U. S. 289, this Court held that the United States could not, in the absence of Congressional direction, maintain a suit to recover excessive profits. However, Mr. Justice Black concluded his opinion for the Court by saying (p. 309):

> * * * But if the Executive is in need of additional laws by which to protect the nation against war profiteering, the Constitution has given to Congress, not to this Court, the power to make them.

7. *The defects in alternative methods of legislative control:* Congress was not without experience in controlling or attempting to control war profits. "The problem of war profits is not new. In this country, every war we have engaged in has provided opportunities for profiteering and

they have been too often scandalously seized. See Hearings before the House Committee on Military Affairs on H. R. 3 and H. R. 5293, 74th Cong., 1st Sess., 590–598. To meet this recurrent evil, Congress has at times taken various measures." *United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289, 309. The Revolutionary War, the Civil War, the Spanish-American War, and World War I had all witnessed war profiteering and efforts to provide controls. In the peacetime decade of the 1930's preventive attempts were made. The record, however, was one of outright failure or only partial success, and the historical methods of control were all inadequate.[12] First, there was excess profits taxation. However, a tax rate of less than 100% obviously left a margin in which substantial war profits could accumulate, varying in amount according to the investment or income basis selected for computation. If the rate was adjusted upward to a full 100%, the net result would be a return to the cost-plus-a-fixed-fee contract; for the supplier knew that no matter how efficient or successful his operation, his return would be limited to his return during the base year. The failure of the excess profits tax of the World War to control war profiteering had demonstrated the in-

[12] See Hensel and McClung, *Profit Limitation Control Prior to the Present War* (1943), 10 Law and Contemporary Problems 187.

adequacy of this method. The Services consistently and strongly opposed the levying of a 100% excess profits tax as an impediment to efficient war production (Patterson affidavit, pars. 31, 34, 35).

Secondly, price ceilings were established. To insure maximum war production, however, price ceilings necessarily had to be set at levels that would permit relatively high-cost producers to continue to operate. This left wide margins within which lower-cost producers could accumulate excessive earnings as a result of the unprecedented increase in volume of production created by war demands. It appeared, too, that a price ceiling would hinder rather than assist the procurement of strictly military items and; in September of 1942, these items, at the request of the Services, were exempted from the General Maximum Price Regulation (Hensel affidavit, pars. 95–98).

Thirdly, there had been attempts to limit the amount of profit to a fixed percentage of the contract price or the cost of performance. The Vinson-Trammell Act of March 27, 1934, as amended, the Merchant Marine Act of 1936, as amended, and the Act of April 3, 1939, limited profits on contracts for the construction of naval vessels, merchant ships, and Army aircraft. By the Act of June 28, 1940, the percentage of profit was fixed at approximately 8% on all these contracts,

but the Second Supplemental National Defense Appropriation Act, 1941, enacted September 9, 1940, raised the limit to 12% for aircraft procurement. However, many producers, especially aircraft manufacturers, were unwilling to take Government contracts subject to this limitation; the auditing burden was seen as too severe; and it was difficult to secure subcontractors who would agree to limit their profit under Government price contracts to 8% or 12%, although available civilian production would allow them much higher profits. Moreover, these profit limitation statutes suffered from the same absence of incentives to efficiency as cost-plus contracts. At the urging of the Services, the application of these statutory limits was suspended by the Second Revenue Act of 1940 as to Army and Navy contractors subject to the new excess profits tax, with respect to contracts entered into after December 31, 1939, or uncompleted on that date. (Patterson affidavit, pars. 20–21, 31, 33; Hensel affidavit, pars. 74, 79, 80, 86, 91–94, 99–101.)

After the Congressional disclosure, in late 1941 and early 1942, of extreme profits by certain defense and war contractors, an attempt was made, in March 1942, to reinstate a statutory limit of 6% profit on all war contracts. This proposal was opposed by the War Department and the War Production Board for reasons similar to those which had led to the suggestion that the

Vinson-Trammell Act be suspended. The relation between such a statutory limitation and the cost-plus form of contract was pointed out and it was also argued that the fairness of an allowable profit percentage depended not only on performance cost, but also on such factors as volume, turnover, amount of invested capital, performance time, financial structure, risks incurred and efficiency. (Patterson affidavit, par. 31; Hensel affidavit, pars. 91–94.) This profit limitation bill was not acted upon by the Congress, but on March 28, 1942, Representative Case offered, as a floor amendment to the Sixth Supplemental National Defense Appropriation Bill, a proposal to limit profits on war contracts to 6%. This amendment was immediately adopted by the House of Representatives without debate. 88 Cong. Rec. 3139–40.

The Services were quick to present their objections to the Case amendment to a subcommittee of the Senate Committee on Appropriations. Hearings before the Subcommittee of the Committee on Appropriations, Senate, 77th Cong., 2d Sess. on H. R. 6868, pp. 22–31, 35–49, 83–92; Patterson affidavits, pars. 33–34. They reiterated that the proposed limitation of 6% would in effect place all contracts on a cost-plus basis, which, as experience in the last war had shown, inevitably resulted in extravagant waste of manpower and materials, and imposed an enormous

administrative burden of auditing and supervision. They again insisted that any fixed percentage limitation was unworkable and unfair because of wide differences among contractors in (1) the amount and source, private or government, of capital invested; (2) the size and nature of the contracts; (3) the volume of production and rate of turnover; (4) the extent of risk assumed, and (5) other similar factors. The effect of a 6% profit limitation on small or weak business, unable to sustain heavy losses, was especially feared.

8. *The adoption of mandatory renegotiation.* The Senate subcommittee accepted the conclusion that the Case amendment would interfere with procurement, but insisted that some form of legislation be enacted. The Services and the War Production Board then proposed that a Joint Resolution be adopted by Congress which would require contractors, at the request of the procuring agencies, to renegotiate their contract prices (Patterson affidavit, par. 34, and Exh. I; Hearings, *supra*, pp. 84–85).

The amendment which was worked out by the Committee and offered by Senator McKellar on the floor of the Senate, differed in material respects from the Services' recommendation. The Committee's proposal required contractors to renegotiate their prices, as the Services had suggested, but, among other things, it added a

provision setting up a sliding scale of maximum allowable profit rates varying from 10% to 2% as the size of the contract increased. Every objection that applied to the first attempt at rigid definition, the 6% limit of the Case amendment, applied with equal force to the second attempt, the definition by a sliding scale. After debate, the Senate concluded that the sliding scale would defeat rather than serve the purposes of the legislation and, accordingly, it was withdrawn, 88 Cong. Rec. 3378–3405. Absent this section, the bill went to conference with the House and the conference report recommended the legislation that was ultimately adopted. H. Rept. No. 2030, 77th Cong., 2d Sess., pp. 8–10; 88 Cong. Rec. 3582–3599; 88 Cong. Rec. 3647–3662, 3666.

The statute as thus enacted did not contain any detailed definition of excessive profits nor any formula pursuant to which the computation was to be made. This fact was explicitly recognized by Congress, but in the words of Congressman Cannon, Chairman of the House Committee on Appropriations, it was decided that "it was a practical impossibility to adopt any such standard"; and in the Senate, Senator Pepper stated the general conclusion of the Congress when he said that it was hoped the bill might prove, because of its flexibility, "to be the wisest and best approach that can be made to this problem."

9. *The scope of renegotiation:* Since the Act was a war measure and an integral part of the war procurement program, its operation was confined to war business carried on by the government agencies most concerned with war procurement. The ordinary commercial contracts of a producer, and his profits on those contracts, were not to be affected by renegotiation.

Within the area of war business, no differentiation was made on the basis of level of contracting. Subcontracts were made subject to renegotiation, without debate. It was obvious that the accumulation of excessive war profits was equally offensive no matter at what level it occurred. Furthermore, all the uncertainties which made adequate pricing on prime contracts impossible were equally significant for subcontracts and had the same effect of making their pricing largely speculative. Indeed, the possibility of profit and price abuse on subcontracts was probably greater than on primes. Normally no Government representative participated in the negotiation of subcontracts, and there was an abiding temptation to prime contractors, particularly under the pressure of demands for immediate production, to accept subcontract price quotations without too much examination of the propriety of the price. Common fairness also demanded that all producers of war material be treated alike, regardless of whether the indi-

vidual contract was with the Government or with a government contractor or his subcontractor.[13]

10. *The testing and retention of renegotiation:* It is not irrelevant to add that from 1942 to 1945 the Renegotiation Act was under constant Congressional scrutiny,[14] that its operation was closely

[13] Renegotiation was made applicable to war agreements, made before or after the date of enactment, provided that final payment had not been made on that date (April 28, 1942). This provision, and the need for it, are discussed *infra*, pp. 90–104.

[14] 1. The following significant Congressional hearings were publicly held:

a. Hearings before the Committee on Finance, U. S. Senate, 77th Cong., 2d Sess., on Sec. 403 of P. L. 528 (September 22 and 23, 1942)

b. Hearings before a Subcommittee of the Committee on Finance, U. S. Senate, 77th Cong., 2d Sess., on Sec. 403 of P. L. 528 (September 29 and 30, 1942)

c. Hearings before the Subcommittee of the Committee on Appropriations, H. of Reps., 78th Cong., 1st Sess., on Mil. Est. App. Bill for 1944, pp. 483–518, 571–580 (June 1, 1943)

d. Hearings before the Subcommittee of the Committee on Appropriations, U. S. Senate, 78th Cong., 1st Sess., on H. R. 2996 (Mil. Est. App. Bill for 1944), pp. 22, 30–33, 125–138, 150–151

e. Hearings before the Committee on Naval Affairs, H. of Reps., 78th Cong., 1st Sess., pursuant to H. Res. 30, Vol. 2 (June 10–30, 1943)

f. Hearings before the Committee on Ways and Means, H. of Reps., 78th Cong., 1st Sess., on H. R. 2324, 2698, and 3015 (Renegotiation of War Contracts) (September 9–23, 1943)

g. Hearings before the Committee on Finance, U. S. Senate, 78th Cong., 1st Sess., on H. R. 3687 (Revenue Act of 1943), pp. 49, 388–392, 402–424, 443–452, 465, 469, 598–601, 620–629, 669–684, 690–696, 925–926, 987–1111, 1121–1132 (November 29–December 15, 1943).

watched, that its merits were thoroughly debated in Congress and by the public, and that there were insistent demands to repeal it, but that after thorough reexamination it was reenacted and retained until the close of 1945. Cf. *East New York*

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h. Hearings before the Committee on Ways and Means, H. of Reps., 79th Cong., 1st Sess., on H. R. 2628 (extension of termination date of Renegotiation Act) (April 12–16, 1945) In addition, private hearings and interviews appear to have been had by Congressional committees.

2. The following major reports on the operation of the Renegotiation Act were issued by Congressional committees:

a. H. Rept. No. 733, 78th Cong., 1st Sess., October 7, 1943, Report of the Committee on Naval Affairs, pursuant to H. Res. 30 (Renegotiation of War Contracts)

b. Senate Rept. No. 10, Part 5, 78th Cong., 1st Sess., March 30, 1943, Additional Report of the Special Committee Investigating the National Defense Program (Renegotiation of War Contracts)

c. S. Rept. No. 10, Part 16, 78th Cong., 2d Sess., March 4, 1944, Additional Report of the Special Senate Committee Investigating the National Defense Program (Third Annual Report), pp. 40–64, 192–199

d. H. Rept. No. 871, 78th Cong., 1st Sess., on H. R. 3687 (Revenue Bill of 1943), November 18, 1943, pp. 75–90

e. S. Rept. No. 627, 78th Cong., 1st Sess., on H. R. 3687 (Revenue Bill of 1943), December 22, 1943, pp. 98–119, and Part 2 (Minority Views)

f. H. Rept. No. 1079, 78th Cong., 2d Sess. on H. R. 3687 (Conference Report on Revenue Act of 1943), February 4, 1944, pp. 34–39, 76–88

3. See also:

a. Renegotiation of War Contracts—Law, Debates, and Other Legislative Materials—Compiled for the use of the Committee on Ways and Means, H. of Reps., 78th Cong., 1st Sess., 1943

b. Data on Renegotiation of Contracts, December 9, 1943, Senate Committee on Finance

*Bank* v. *Hahn*, 326 U. S. 230, 234–235. The original act was amended five times, but its basic structure was constantly maintained after full review and periodic criticism. Though initially somewhat dubious, the war procurement agencies heartily supported the continuance of renegotiation during the war and opposed all proposals to substitute tax devices for syphoning off excessive profits (Patterson affidavit, par. 36; Hensel affidavit, pars. 101, 123).[15]

11. *The results of renegotiation:* We are advised by the War Contracts Price Adjustment Board that as of June 30, 1947, 118,101 contractors had been assigned for renegotiation with respect to 1942 through 1946 fiscal years, and contracts aggregating over $190,000,000,000 (excluding contractors eliminated because of exemptions or non-coverage) were subjected to renegotiation. Of the total assignments, 115,535 (or 97.8%) were completed as of June 30, 1947. Out of the 115,-

[15] Discussions of the Act's operation, and of renegotiation practices and procedures, are contained in the symposium on "War Contract Renegotiation," 10 Law and Contemporary Problems, No. 2 (Autumn 1943); symposium on "Renegotiation," 11 U. Chi. L. Rev., No. 3 (April 1944); Steadman, *Renegotiation of War Contracts* (1943), 42 Mich. L. Rev. 1; *Legal Aspects of Renegotiation* (1944), 42 Mich. L. Rev. 545; Steadman, *A Further Legal Inquiry Into Renegotiation* (1944), 43 Mich. L. Rev. 1, 235; Farrand, *The Renegotiation Legislation* (1944), 44 Col. L. Rev. 216; Christensen, *Economic Implications of Renegotiation of Government Contracts* (1944), 52 J. Pol. Econ. 48; Browning, *Price Control in War Procurement* (1943), 29 Corn. L. Q. 145.

535 completed assignments, 85,037 (or 73.6%) resulted in cancellations or clearances indicating that no excessive profits had been made or that the contractor was found to be exempt from renegotiation; 28,889 (or 25%) resulted in bilateral refund agreements between the Government and the contractor; 1,609 (or 1.4%) resulted in unilateral determinations by the Departments or the War Contracts Price Adjustment Board. Of the 30,498 assignments involving determinations of excessive profits, 1,609 (or 5.28%) were unilateral determinations and 28,889 (or 94.72%) were bilateral.

Also as of June 30, 1947, the gross recoveries through renegotiation amounted to some $10,434,637,000, and the estimated net recovery (after deduction of the federal tax credit allowed contractors on renegotiation refunds) amounted to $3,130,391,000.[16] Of the total gross recoveries of $10,434,637,000, some $895,493,000 (or 8.58%) were involved in unilateral determinations and

[16] These figures do not take account of (a) refunds made to contracting officers prior to and unrelated to statutory renegotiation, (b) price reductions on reorders, successive procurements, or with respect to future performance or deliveries under existing contracts, (c) savings from the absence of contract termination claims that otherwise might have been filed. No data is available as to the amount of excessive profits so eliminated or prevented, but it is known to be very large and resulting in substantial measure from the existence of the Renegotiation Act and the policies followed in its administration.

the rest were recovered by voluntary agreement.[17]

B. CONGRESS MAY AUTHORIZE THE RECAPTURE OF EXCESSIVE PROFITS REALIZED UNDER WAR CONTRACTS

The power of the Federal Government to control excessive profits under war contracts by renegotiation may be rested upon the war powers (cf. *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752, 774), the power to regulate government contracts and control public funds (Collier, *Constitutionality of Statutory Renegotiation* (1943), 10 Law and Contemporary Problems 353, 354–357; cf. opinion of Judge Yankwich in No. 74, R. 199–202, 205),[18] and the taxing power. The lower courts have all sustained the Act under the war powers, and whatever basis Congress' peacetime powers may supply to this type of recapture legislation, there can be no doubt that a wartime renegotiation statute finds ample support in the power of the national government "to wage war successfully." *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 426. That power "extends to every matter and activity so related to war as substantially to affect its conduct and progress. The power is not restricted to the winning of victories in the field and the repulse of enemy forces. It embraces

[17] Comparable statistics as of September 1944 are contained in the Patterson affidavits, pars. 40–41.

[18] Cf. *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 543–544; *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 127.

every phase of the national defense, including the protection of war materials and the members of the armed forces from injury and from the dangers which attend the rise, prosecution and progress of war." *Hirabayashi* v. *United States,* 320 U. S. 81, 93.

As the Circuit Court of Appeals for the Ninth Circuit stated in sustaining the validity of the Act (*Spaulding* v. *Douglas Aircraft Company, Inc.,* 154 F. 2d 419, at 422):

> The Renegotiation Act * * * is an exercise of that same power to wage war which permits the government to control the price of every commodity bought and sold within the national boundaries (*Yakus* v. *United States,* 321 U. S. 414); to fix the amount or rent to be charged for every room, home, or building and this even though to an individual landlord there may be less than a fair return (*Bowles* v. *Willingham,* 321 U. S. 503); to construct extensive systems of public works (*Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288); to operate railroads (*Northern Pacific R. Co.* v. *North Dakota,* 250 U. S. 135); to prohibit the sale of liquor (*Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146); to restrict freedom of speech in a manner that would be unwarranted in time of peace (*Schenck* v. *United States,* 249 U. S. 47); to ration and allocate the distribution of every commodity important to the war effort (*Steuart & Bro.* v. *Bowles,*

322 U. S. 398); to restrict the personal freedom of American citizens by curfew orders and the designation of areas of exclusion (*Hirabayashi* v. *United States,* 320 U. S. 81); and, finally, to demand of every citizen that he serve in the armed forces of the nation (*Falbo* v. *United States,* 320 U. S. 549; *Selective Draft Law Cases,* 245 U. S. 366).

It is obvious that the war powers, thus reaching as they do every activity relating to war and permitting national control over the lives and liberties of men, must include the powers to control war profiteering. Cf. *Bowles* v. *Willingham,* 321 U. S. 503, 509. And so this Court has explicitly declared. *United States* v. *Bethlehem Steel Corp.,* 315 U. S. 289, 309.[19] In the exercise of this power to restrict war profiteering, Congress is surely free to choose the recapture of excessive profits by mandatory renegotiation as a reasonable means. Such renegotiation which, as Judge Wyzanski properly observed (No. 95, R. 14–15), in substance fixes a ceiling on profits, cannot be successfully distinguished from the fixing of price ceilings in order to control inflation, which it is settled that Congress may authorize. *Yakus* v. *United States,* 321 U. S. 414; *Bowles* v. *Willingham,* 321 U. S. 503.

[19] "But if the Executive is in need of additional laws by which to protect the nation against war profiteering, the Constitution has given to Congress, not to this Court, the power to make them."

This type of regulatory measure, moreover, does not differ in essence from the peacetime recapture provisions of Section 15a of the Transportation Act of 1920, 41 Stat. 488 [20] which provided that the earnings of a carrier in excess of 6% of the value of its aggregate property were to be divided, one half to be retained by the carrier for limited purposes and the other half to be transferred to and used by the Interstate Commerce Commission as a fund for making loans to other carriers. These provisions were upheld in *Dayton-Goose Creek Railway* v. *United States,* 263 U. S. 456. Just as the railroads were required by the Transportation Act to refund their excessive earnings to the Government as an incident to the regulation of railroad rates under the interstate commerce powers, so war contractors and subcontractors are required by the Renegotiation Act to refund their excessive earnings to the United States as an incident to the regulation of war profiteering and as part of the war program.

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[20] Section 15a was repealed by the Emergency Railroad Transportation Act of 1933 (48 Stat. 220). In 1933 the railroads, because of the depression, had no funds to discharge obligations to the I. C. C. which had earlier accrued, and such monies as were available were urgently needed to pay operating expenses. Furthermore, it was extremely unlikely under prevailing business conditions that any excessive profits would be earned in the foreseeable future. See H. Rep. No. 193, 73d Cong., 1st Sess.

### C. THE RENEGOTIATION ACT DOES NOT UNLAWFULLY DELEGATE LEGISLATIVE AUTHORITY

The original Act directed the recovery of "excessive profits" without statutory particularization of the factors to be considered; the Revenue Act of 1943 (the Second Renegotiation Act) expressly listed seven factors to be taken into consideration by the renegotiating Departments and the Tax Court in determining excessive profits (Section 403 (a) (4) (A)); however, this provision of the Second Act was not made applicable to redetermination of profits related to fiscal years ending prior to July 1, 1943 (Section 701 (d)), and in those cases the original provision governs both in the Departments and the Tax Court. In Nos. 105 (*Lichter*) and 95 (*Alexander*), the Under Secretary's determinations concerned fiscal years ending prior to July 1, 1943, and the controlling standard is that of the original Act; in No. 74 (*Pownall*), only profits earned during the calendar year 1943 are involved and the specifications of the Second Renegotiation Act are therefore applicable. In each case, the petitioners attack the governing provisions as invalidly delegating legislative power.[21] We submit that, on the contrary, the standards prescribed by both the first and

[21] Petitioners in No. 74 also attack the provisions of the First Renegotiation Act, which is not directly involved in their case, as part of their attack on the Second Act.

second versions of the Act sufficiently define the scope of the administrative authority conferred.

1. *The original Act*

a. *The constitutional requirement:* In recent Terms, the Court has often restated the extent of the requirements which the Constitution imposes upon Congressional legislation delegating administrative authority. "The Constitution, viewed as a continuously operative charter of government, is not to be interpreted as demanding the impossible or the impracticable." *Opp Cotton Mills* v. *Administrator,* 312 U. S. 126, 145; *Bowles* v. *Willingham,* 321 U. S. 503, 515; cf. *Yakus* v. *United States,* 321 U. S. 414, 424. "In terms of hard-headed practicalities Congress frequently could not perform its functions if it were required to make an appraisal of the myriad of facts applicable to varying situations * * * and then to determine in each case what should be done. Congress does not abdicate its functions when it describes what job must be done, who must do it, and what is the scope of his authority. In our complex economy that indeed is frequently the only way in which the legislative process can go forward." *Bowles* v. *Willingham, supra,* at 515; cf. *Sunshine Coal Co.* v. *Adkins,* 310 U. S. 381, 397–398; *Yakus* v. *United States,* 321 U. S. 414, 424–425. As the Court put it at the last Term: "Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel

Congress to prescribe detailed rules; it then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *American Power & Light Co.* v. *Securities and Exchange Commission,* 329 U. S. 90, 105. Nor is Congress confined "to that method of executing its policy which involves the least possible delegation of discretion to administrative officers. * * * It is free to avoid the rigidity of such a system, which might well result in serious hardship, and to choose instead the flexibility attainable by the use of less restrictive standards. * * * Only if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose * * *." *Yakus* v. *United States, supra,* at 425–426.

b. *The action of Congress:* The Renegotiation Act was enacted and continued, as its legislative history discloses (*supra,* pp. 33–51), because it was believed to furnish the only fair and practical means of protecting the public against inordinate war profits, without unduly restricting the profit incentive necessary to insure maximum war production. No one can contend that Congress failed to consider the problem of war profiteering, or

abstained from laying down the general policy that excessive war profits must be eliminated, or did not give careful consideration to the available means for bringing about that result. The choice narrowed to one between some rigid formula, such as a strict percentage or a sliding scale limitation, and an exercise of administrative judgment informed by all relevant considerations. In order to be fair to all war contractors and to avoid crippling the war procurement program, Congress chose the latter alternative as the only acceptable one,[22] and later affirmed its initial choice after detailed review. See *supra,* pp. 45–47, 49–51; *infra,* pp. 76–80; cf. Steadman, *A Further Legal Inquiry Into Renegotiation,* I, (1944), 43 Mich. L. Rev. 1–4.

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[22] In the course of the debate in the House of Representatives on the conference proposal respecting renegotiation, the following colloquy occurred (88 Cong. Rec. 3584:

> Mr. TARVER. Why should not the Congress determine what is or is not a reasonable profit instead of delegating that authority to the Secretary?
>
> Mr. CANNON of Missouri [in charge of the conference bill]. That phase of the proposition, along with many others, was considered by the conferees, but due to the wide variation in amounts involved, from 15 cents to $15,000,000,000, and in subject matter ranging from contracts for the purchase of a carload of eggs to the manufacture of a four-engine bomber, it was a practical impossibility to adopt any such standard as the gentleman suggests.

A similar colloquy took place in the Senate between Senators Pepper and McKellar, 88 Cong. Rec. 3653–4.

The Act clearly embodies a definitive congressional "policy of waging war" on "excessive profits." Cf. *Bowles* v. *Willingham*, 321 U. S. 503, 514. No discretion is vested in any administrative agent to enforce the congressional policy or not "as he may see fit" (cf. *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 415); the administrative authorities are directed to renegotiate whenever they find that excessive profits have been or are likely to be realized (First Act, Section 403 (c); Second Act, Section 403 (c) (1)). And the administrator's choice of means to enforce the declared statutory policy of eliminating excessive profits is strictly confined to the renegotiation of described war contracts. Cf. *Yakus* v. *United States*, 321 U. S. 414, 424; *Schechter Corp.* v. *United States*, 295 U. S. 495.

c. *The sufficiency of the standard of "excessive profits."* Petitioners do not deny that Congress has formulated the policy of abolishing excessive profits and has delimited the means to be used. Their claim is that the standard of "excessive profits," the elimination of which is the goal of renegotiation, is too flexible, vague, and unconfined to indicate the congressional will and guide the administrative process. The very flexibility of the Act was considered by Congress to be its principal merit. The charge that such flexibility violates the Constitution is at war with a half century of judicial precedent and ignores the

teachings of practical experience under the Act. In over 95% of the renegotiation proceedings conducted this far, the Government and the contractor have agreed upon the amount of excessive war profits to be refunded to the United States. See *supra*, pp. 52–53. No such concensus is probable except in circumstances where the objective is well understood by both parties. If in 95% of the cases the renegotiating officials and the contractors reach ag. ement, no legitimate or even significant complaint can be made about the absence of standards to provide a guide for the administrators and the public alike.

(1) *Meaning of the standard*: Congress was, of course, not required by the Constitution to establish a mathematical formula, or one "that would be at once comprehensive and automatic," (*Mutual Film Corp.* v. *Ohio Industrial Comm.*, 236 U. S. 230, 245–247), for the determination of excessive profits; it was "free to avoid the rigidity of such a system, which might well result in serious hardship, and to choose instead the flexibility attainable by the use of less restrictive standards." *Yakus* v. *United States*, 321 U. S. 414, 425–426. And like many other enactments, the 1942 Act employed as this "less restrictive standard" a single broad comprehensive phrase, without specifying the factors to be considered in taking administrative action. But these factors need not be named on the face of the statute.

It is enough if "ascertainable criteria" are disclosed by "the history of the act and its proper construction" (*Buttfield* v. *Stranahan*, 192 U. S. 470, 494–496); by the "history of the times when it was passed" (*Great Northern Ry. Co.* v. *United States*, 315 U. S. 262, 273); or by "the purpose of the Act, its factual background and the statutory context * * *." *American Power & Light Co.* v. *Securities and Exchange Commission*, 329, U. S. 90, 104; cf. *Intermountain Rate Cases*, 234 U. S. 476, 487–488; *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 24–25; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 416. Such factors are clearly available to make the term "excessive profits" a fully "intelligible principle" (*Hampton & Co.* v. *United States*, 276 U. S. 394, 409) for the direction and guidance of the renegotiating agencies.[23]

The circumstances which led to the statute's enactment and the choice of this flexible method

[23] The Constitution itself is a warrant that the term "excessive" is a sufficiently precise vehicle, taken in its context, for conveying meaning and determining legal rights. The Eighth Amendment forbids both "excessive bail" and "excessive fines." Similar provisions appear in state constitutions. The term is also frequently used in state legislation. See, *e. g.* the statutes referred to in *Greenwood County* v. *Shay*, 23 S. E. 2d 825 (S. C.) (excessive punishment); *Taylor* v. *Koenigstein*, 260 N. W. 544 (Neb.) (excessive drinking); *Alexander* v. *Able*, 70 S. E. 1009 (S. C.) (excessive rent distraint); *State* v. *Small*, 11 N. W. 2d 377 (Iowa) (excessive punishment).

have already been outlined (*supra*, pp. 41–47). They disclose that Congress was largely concerned with excessive profits resulting from inability to make an accurate forecast of reasonable costs and profits in producing articles never before fabricated by that contractor, or never previously manufactured at all, or in producing in vastly larger quantities articles of peacetime manufacture. The procurement agencies had urged, and Congress had been convinced, that it was all-important to give contractors financial incentives to cut costs and to work efficiently, and for that reason cost-plus contract forms, and equivalent types of legislation with fixed profit limitations, must be avoided. Representatives of the war procurement agencies had pointed out to the Congress that the fairness of a profit rate also necessarily varies with such factors as rapidity of turn-over, development costs, production time, money invested in the business, risks incurred, efficiency of production, the source, private or government, of the capital invested, and financial structure. The Congress was likewise made aware of the voluntary price adjustment procedures already established or contemplated in the War and Navy Departments, and informed that tentative policies and procedures had been laid down;[24] and the "redetermination" and "re-

[24] In March of 1942, a memorandum had been prepared in the War Department which was designed to guide Department officials in conducting voluntary negotiations. The

negotiation" contract articles, which had been developed by the major war agencies in an attempt to cut both excessive costs and excessive profits, were described and their use explained (Patterson affidavit, pars. 30, 33, Exh. H). Moreover, "excessive profits are those in excess of reasonable profits" (*Spaulding* v. *Douglas Aircraft Co., Inc.*, 154 F. 2d 419, 423 (C. C. A. 9)), and the Congress was undoubtedly aware of the comparative sources available, in peacetime as well as in war, for adjudging the reasonableness of profits: The general prevailing rate of return and the rate current in the particular industry; rates of return allowed by regulatory and utility commissions; tax rates; statutory rates of return such as the Vinson-Trammell Act; interest rates; usury laws and other statutes fixing legal rates of interest; banking standards; average corporate dividends; rates of return on preferred stock;

memorandum (described in Paragraph 27 of the Patterson affidavit and attached as Exhibit E to that affidavit) sets forth in detail the factors appropriate for consideration in distinguishing between reasonable and excessive profits. They are remarkably similar to the factors contained in the War Department's Principles, Policy and Procedure To Be Followed in Renegotiation, issued August 10, 1942, and in the Joint Statement of March 31, 1943, by the War, Navy, and Treasury Departments and the Maritime Commission, and in the Second Renegotiation Act (Revenue Act of 1943, Title VII, Section 403 (a) (4) (A)). There is no indication that the actual terms of the March 1942 memorandum were shown to any congressional committee. Cf. Browning, *Price Control in War Procurement* (1943), 29 Corn. L. Q. 145, 163–165.

normal techniques of capitalizing return as a method of determining value; profit allowances on cost-plus-a-fixed-fee contracts; and, perhaps most significantly, the prior financial history of the particular contractor.

Under a proper construction of the original Act, therefore, the Secretary was required to consider at least the following factors: (a) the reasonableness of the normal profit margin on articles of peacetime manufacture under conditions of vastly increased wartime production; (b) the reasonableness of profits on products of new manufacture in the light of the actual costs and risks disclosed by experience in production; (c) the amount and source of capital, private or governmental; (d) the size and nature of the business and of the contract operation; (e) the contractor's efficiency and contribution to the war effort; (f) the various risks assumed; (g) the history of the contractor's operations.

True, the Secretary was at liberty to consider additional relevant factors, and to implement the basic factors by formulating subsidiary rules or policies, but the cases uniformly uphold such discretion to consider unnamed additional "relevant factors" and to determine the respective weights attributable to each factor. *Hampton & Co.* v. *United States,* 276 U. S. 394; *Opp Cotton Mills* v. *Administrator,* 312 U. S. 126, 145–146; *Yakus* v. *United States,* 321 U. S. 414, 427.

This is particularly so where, as here, Congress reasonably relies on the expertise of the administrators (cf. *American Power & Light Co.* v. *Securities and Exchange Commission,* 329 U. S. 90, 104. *Sunshine Coal Co.* v. *Adkins,* 310 U. S. 381, 399–400), and the statute's general terms, "like other general terms," can be expected to "get precision from the sense and experience of men and become certain and useful guides in reasoning and conduct." *Mutual Film Corp.* v. *Ohio Industrial Comm.,* 236 U. S. 230, 245–246.

(2) *Comparison of Standards:* (a) In this light, the standard of "excessive profits" is certainly no more vague and indefinite than other single standards which this Court has upheld: "unreasonable obstruction" to navigation (*Union Bridge Co.* v. *United States,* 204 U. S. 364); "just and reasonable" for rate making purposes (*Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420; *Sunshine Coal Co.* v. *Adkins,* 310 U. S. 381, 398; *Federal Power Commission* v. *Hope Gas Co.,* 320 U. S. 591, 600–601); "reciprocally unequal and unreasonable" customs duties (*Field* v. *Clark,* 143 U. S. 649); "public interest" in various contexts (*New York Central Securities Corp.* v. *United States,* 287 U. S. 12, 24; *United States* v. *Chemical Foundation,* 272 U. S. 1; *Avent* v. *United States,* 266 U. S. 127); "public interest, convenience, or necessity" (*National Broadcasting Co.* v. *United States,* 319 U. S. 190, 225–226);

"undue preferences and unjust discriminations" (*Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 427); "unfair methods of competition" not defined or forbidden by the common law (*Federal Trade Commission* v. *Keppel & Bro.,* 291 U. S. 304, 312, 314); tea "inferior in purity, quality, and fitness for consumption to the standards" prescribed by the Secretary of the Treasury (*Buttfield* v. *Stranahan,* 192 U. S. 470); "films * * * of a moral, educational or amusing and harmless character" (*Mutual Film Corp.* v. *Ohio Industrial Comm.,* 236 U. S. 230, 245–247); "primarily" or substantially (*Board of Governors of the Federal Reserve System* v. *Agnew,* 329 U. S. 441, 449); the "power to appoint a conservator" for a federal savings and loan association (*Fahey* v. *Mallonee,* decided June 23, 1947, No. 687, last Term); and a "fair and reasonable" rent for premises, to be determined by the courts (*Edgar A. Levy Leasing Co.* v. *Siegel,* 258 U. S. 242, 243, 249–250).

(b) Against the background which gives body to the words, the unitary standard of "excessive profits" is even as precise as the statutes specifying, in terms, multiple factors of a general character to be weighed by administrators in taking action similar to that undertaken under the Renegotiation Act, such as the fixing of maximum or minimum prices, or of wages. *Hampton & Co.* v. *United States,* 276 U. S. 394; *Mulford* v. *Smith,* 307 U. S. 38, 48–49; *Currin* v. *Wallace,* 306 U. S.

1; *United States* v. *Rock Royal Co-operative*, 307 U. S. 533, 574–577; *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 399; *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126; *Yakus* v. *United States*, 321 U. S. 414; *Bowles* v. *Willingham*, 321 U. S. 503; *American Power & Light Co.* v. *Securities and Exchange Commission*, 329 U. S. 90.[25]

(3) *Delegation in Wartime:* The standard of "excessive profits" is thus valid when tested by peacetime precedents. It may well be that even broader discretion is delegable in order "to wage war successfully." (Cf. *Hirabayashi* v. *United States*, 320 U. S. 81, 93; *Yakus* v. *United States*, 321 U. S. 414, 462 (Rutledge J. dissenting); *Stein Bros. Mfg. Co.* v. *Secretary of War*, 7 T. C. 863, 878, 880–881; compare *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 320, 322. Certainly the discretion conferred by the

[25] The existence of judicial review of administrative action would appear to be irrelevant to the scope of permissible delegation. Cf. *Fahey* v. *Mallonee*, decided June 23, 1947, No. 687, last Term, slip sheet pp. 6, 10–11. If, however, this is to be deemed a significant factor, it should be noted that the Act does not stop with departmental action but provides for a *de novo* redetermination by the Tax Court, and it is still unsettled "whether Congress intended to give the Tax Court the last word upon all questions of fact and law, or whether it could do so if that were surely its purpose." *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752, 771. Moreover, the Tax Court is an agency with "essentially judicial procedures and experience." *Dobson* v. *Commissioner*, 320 U. S. 489, 498; *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, *supra*, at p. 769.

standard of "excessive profits" is no broader than the power conferred on the Secretary of War to do "everything by him deemed necessary" to suppress houses of ill-fame within such distance of Army posts "as he may deem needful," upheld in *McKinley* v. *United States,* 249 U. S. 397; or the President's authority to take possession of and operate telegraph lines "whenever he shall deem it necessary for the national security or defense," sustained in *Dakota Central Tel. Co.* v. *South Dakota,* 250 U. S. 163.

Perhaps the most striking illustration of the extent to which Congress may, during a war period, delegate power to executive officials is furnished by the Second War Powers Act of March 27, 1942, 56 Stat. 177, 50 U. S. C. App., Supp. V, 633, which founded the entire national program for rationing and allocation of material upon a single sentence (see O'Brian and Fleischmann, *The War Production Board Administrative Policies and Procedures* (1944), 13 Geo. Wash. L. Rev. 1, 15 *et seq.*):

> Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the Prseident may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary

> or appropriate in the public interest and to promote the national defense.

The validity of this sweeping delegation of power to the President has been uniformly sustained.[26] If under the exigencies of war Congress can delegate power to ration and allocate "any material or facility" as to which there is a shortage, in any manner that the President, or his delegate, deems appropriate "in the public interest and to promote the national defense," it is difficult to believe that Congress cannot leave to administrative officials the more limited task of exercising a case by case judgment of "excessive profits."

(4) *Delegation in the field of government procurement:* The Constitution may likewise permit broader delegation of authority with respect to the renegotiation of public contracts and subcontracts.[27] Cf. Collier, *Constitutionality of Statutory Renegotiation* (1943), 10 Law and Contemporary Problems 353, 358 *et seq.;* Sharp, *Com-*

[26] *O'Neal* v. *United States*, 140 F. 2d 908 (C. C. A. 6), certiorari denied, 322 U. S. 729; *United States* v. *Randall*, 140 F. 2d 70 (C. C. A. 2); *Gallagher's Steak House* v. *Bowles*, 142 F. 2d 530 (C. C. A. 2), certiorari denied, 322 U. S. 764; *Country Garden Market, Inc.* v. *Bowles*, 141 F. 2d 540 (App. D. C.), certiorari denied, 322 U. S. 752; *Walter Brown & Sons* v. *Bowles*, 58 F. Supp. 323 (D. C. D. C.); *United States* v. *Tire Center, Inc.*, 50 F. Supp. 404 (D. Del.).

[27] At least, of those contracts and subcontracts entered into after the passage of the controlling statute and in the light of its provisions.

*ments on Renegotiation and the Constitution* (1944), 11 U. of Chi. L. Rev. 271, 282–283. The Federal Government has the same power as private individuals and businesses "to fix the terms and conditions upon which it will make needed purchases" (*Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 127), and in the sphere of procurement it is reasonable to require less direction from Congress and more latitude for the executive than might be allowable where private activities are being regulated. Cf. *Cincinnati Soap Co.* v. *United States*, 301 U. S. 308, 321–323 (broad authority of Congress to delegate use of appropriated funds). Especially in times of war or emergency, Congress has granted the broadest authority to fix the form, terms, and conditions of public contracts, and such delegation has never been seriously questioned. Cf. Act of July 2, 1940, 54 Stat. 713 (authority to make non-competitive contracts); Title II of the First War Powers Act 1941 (55 Stat. 838, 839, 50 U. S. C. App., Supp. V, 611) (authority to "enter into contracts * * * without regard to the provisions of law * * *" whenever it was deemed that "the prosecution of the war" would be facilitated). Under such general statutes, procurement officials could properly agree to a contract clause providing for the mandatory renegotiation of contracts resulting in "excessive profits," without further specification, or even a

clause reserving full discretion to the Government to refix the contract price. The canon forbidding delegation of legislative power should certainly not prevent Congress from requiring procurement officials to adopt such a clause in all contracts and subcontracts.[28]

(5) *Cases on which petitioners rely:* None of the cases in which this Court has invalidated a congressional act because of unlawful delegation of legislative authority is applicable. Section 3 of the National Industrial Recovery Act, held invalid in *Schechter Corp.* v. *United States,* 295 U. S. 495, authorized the establishment of codes of "fair" competition, "the nature of whose permissible provisions was left undefined" (see *Yakus* v. *United States,* 321 U. S. 414, 424), and thus conferred "virtually unfettered" discretion upon private groups as well as public authorities in enacting laws for the government of trade and industry throughout the country (*Schechter* case, *supra,* at 535, 537). Here the statutory authority extends only to one subject, the recovery of excessive profits realized from war contracts. Section 9 (c) of the National Industrial Recovery Act, contested in *Panama Refining*

[28] Since 1866, it has been provided that government telegrams shall be sent at rates to be annually fixed by the Postmaster General, or, now, the Federal Communications Commission, without further standard. Post Roads Act of 1866, 15 Stat. 221, R. S. 5266, as amended by the Act of March 6, 1943, c. 10, Sec. 6, 57 Stat. 12; 47 U. S. C., Supp. V, 3.

*Co.* v. *Ryan*, 293 U. S. 388, defined the subject matter to which the President's authority extended (*i. e.*, the prohibition of the transportation of petroleum), but, as the Court saw it, did not specify in any way, expressly or by implication, the occasion for the exercise of this authority. In the Court's view, the President had unlimited power to "lay down the prohibition, or not to lay it down, as he may see fit. And disobedience to his order is made a crime punishable by fine and imprisonment" (*id.* at 415). Here the recapture of excessive profits is directed upon a finding that such profits have been realized, and criminal sanctions are not invoked. In *Carter* v. *Carter Coal Co.*, 298 U. S. 238, the Court condemned the provisions of the Bituminous Coal Conservation Act of 1935 authorizing the majority of coal producers and miners to fix wages on the ground that it constituted a delegation of legislative authority "to private persons" (*id.* at 311). The Renegotiation Act vests all authority in public officials.

The three cases arising under the Lever Act (*United States* v. *Cohen Grocery Co.*, 255 U. S. 81; *Weeds* v. *United States*, 255 U. S. 109; *Small Co.* v. *American Sugar Refining Co.*, 267 U. S. 233) likewise do not touch upon the problem before the Court. They deal not with the propriety of delegation of power to government officials but with the very different problem of the duty of Congress when, *without administrative assistance*, it

seeks to define crimes or to declare transactions unlawful.[29] In the portion of the Lever Act invalidated in the *Cohen Grocery* case, Congress did not authorize a government official to fix reasonable prices but attempted to obligate each seller to make that decision for himself on peril of criminal penalties if a jury should later come to a different conclusion. The *Small Co.* case applied the doctrine of the *Cohen* case to a subsection in which a defendant sought to avoid his contractual obligations by contending, in the absence of any administrative determination (267 U. S. at 242–243), that the price he agreed to pay was an unjust charge and therefore unlawful. Where the President fixed coal prices under another section of the Lever Act, on the basis of cost plus a "just and reasonable profit" (279 U. S. at 259–260), the Court found no difficulty in applying both the statute and the administrative determination in a suit between buyer and seller. *Highland* v. *Russell Car & Snow Plow Co.*, 279 U. S. 253.

The controlling distinction is that the instant cases involve the propriety of a delegation of power to a government official to make specific what the statute provides in general terms. The

[29] The same is true of *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, *Connally* v. *General Constr. Co.*, 269 U. S. 385, *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, and *Lanzetta* v. *New Jersey*, 306 U. S. 451, involving state criminal statutes of insufficient precision.

Renegotiation Act "does not purport finally to define the duty" of contractors but "directs that an administrative officer shall mark the scope of the obligation, and only then" does the Act "compel obedience to its mandate." *Pacific Tel. Co.* v. *Seattle*, 291 U. S. 300, 303. In the cases striking down parts of the Lever Act, and in the state statutes invalidated for indefiniteness (*supra*, p. 75, fn. 29) there was no such delegation; persons affected by the legislation were required to conform to a broad statutory standard "in advance" and at their peril. The distinction was forcefully pointed out by Chief Justice Taft in *Mahler* v. *Eby*, 264 U. S. 32, in distinguishing the *Cohen Grocery* cases:

> In those cases, statutes were held invalid for vagueness. They were both criminal cases in which the uncertain words of the statute encountered the limitation of the Fifth and Sixth Amendments. They did not inform the accused sufficiently of the nature and cause of the accusation. *The rule as to a definite standard of action is not so strict in cases of the delegation of legislative power to executive boards and officers.* [Italics supplied.] (P. 41.)

2. *Congressional ratification of administrative practice*

Whatever doubts there may have been as to the limits of discretion imposed by the original Act were removed by the reenactment of the Act on October 21, 1942, by the amendment of the

statute on July 1, 1943, expressly applying "all the provisions" of the Act to certain subsidiaries of the Reconstruction Finance Corporation, and by the full revision of the Act in the Revenue Act of 1943. In all three instances, Congress acted with full knowledge of the standards previously announced in the administration of the Act, and its supervision of administrative practice during the entire period from 1942 through 1944 was continuous, thorough, and intense. See *supra*, pp. 49–51; cf. Jaffe, *An Essay on Delegation of Legislative Power* (1947) 47 Col. L. Rev. 359, 363–374. The subsequent application to petitioners of these standards is therefore clearly "in compliance with the legislative will." *Yakus* v. *United States*, 321 U. S. 414, 425.

When the Revenue Act of 1942 was before the Senate Finance Committee, the renegotiating departments presented certain proposed amendments to the Act which were designed to clarify the statute.[20] In the course of the committee hearings, a War Department representative was asked to explain the policy and practice of the departments in arriving at a determination of excessive profits. In direct response to this inquiry, the War Department directive of August 10, 1942, "Principles, Policy and Procedure To Be Followed in Renegotiation," was submitted to the

[20] Hearings before Committee on Finance, U. S. Senate, on Public Law No. 528, Sept. 1942, 77th Cong., 2d Sess., pp. 1–45.

committee. This directive contained a full and clear statement (pp. 10–17) of the factors to be considered in determining what profits were excessive. The full committee appointed a subcommittee to give further attention to the proposed amendments. The release of August 10 was filed with the committee.[31] It was, therefore, with full understanding of the administrative interpretation of the term "excessive profits" that Congress adopted the amendments proposed by the Services. Title VIII of the Revenue Act of 1942, which became law October 21, 1942, reenacted the significant sections of the Renegotiation Act with an express provision that the statute, thus amended, was effective as of April 28, 1942, the date of the original enactment.

The release of August 1942, to be sure, contained only the standards formally adopted by the Army. On March 31, 1943, however, the War, Navy, and Treasury Departments, and the Maritime Commission announced a "Joint Statement by the War, Navy and Treasury Departments and the Maritime Commission of Purposes, Principles, Policies, and Interpretations" under the Renegotiation Act (hereinafter referred to as "Joint Statement"). The Joint Statement and the principles therein announced were discussed

[31] Hearings before Committee on Finance, U. S. Senate, on Public Law No. 528, Sept. 1942, 77th Cong., 2d Sess., pp. 16–25.

at length in June 1943 in the course of hearings conducted by the House Naval Affairs Committee (see Hearings before House Committee on Naval Affairs, 78th Cong., 1st Sess., Vol. 2, pp. 469 *et seq.*), and were made a part of the record thereof (*id., supra,* at p. 1025). It reflected the policies which the Navy had followed during the past year (*id., supra,* at p. 469).

The Joint Statement of March 31, 1943, set forth factors to be considered in renegotiation which were substantially the same as those announced by the War Department on August 10, 1942. Both documents reaffirmed, with appropriate implementation in detail, the basic factors in the minds of the procurement agencies and made known to Congress at the time of the passage of the original Act.[32] See *supra,* pp. 44–46, 64–66.

[32] Both the Joint Statement of March 1943 and the War Department's statement of August 1942 stressed consideration of the following factors:

(1) The efficiency of the contractor, in the reduction of costs, economy in the use of labor and materials, and in the quality and quantity of production;

(2) The volume of production, profits to decrease as volume increased;

(3) The amount and source of capital, private and Government;

(4) The peacetime margin of profits on products previously produced, with due allowance for the absence of competition under conditions of unlimited wartime demand;

(5) The extent of the risk assumed by the contractor in fixed-price contracts under conditions of wartime production;

(6) The nature of the business, including the complexity

The seven factors set forth in the Revenue Act of 1943 (Section 403 (a) (4) (A)) (statutory pamphlet, pp. 19–20) are almost identical with those previously listed by the administrative agencies, and were obviously largely copied and condensed from the provisions of the Joint Statement.

In each of the instant cases, the Under Secretary's determination of petitioners' excessive profits was made in the latter part of 1944, long after the amendmnts of October 21, 1942, and of July 1, 1943, and the passage of the Revenue Act of 1943 in February 1944.[33] It would seem plain that at least by that time the administrative construction of the standard of "excessive profits," and official practice in applying it, had crystallized, been made known to the Congress, and been confirmed. *Hirabayashi* v. *United States,* 320 U. S. 81, 91, to name only the most recent leading case, holds that in such circumstances any objection based on improper delegation of legislative authority is fore-

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of the manufacturing technique, the extent of subcontracting, and the rate of turnover;

(7) The nature and extent of the contractor's contribution to the war effort; and

(8) Other factors which may be relevant in the particular case.

[33] The determinations in the two cases (Nos. 95 and 105) under the original Act were governed by the Joint Renegotiation Manual, issued by the Joint Price Adjustment Board, on January 27, 1944, Chapter IV of which ("Determination and Elimination of Excessive Profits") substantially reiterated the standards and factors set forth in the Joint Statement of March 1943.

closed. Pursuant to an executive order issued on February 19, 1942, General De Witt, Commander of the Western Defense Command, promulgated curfew regulations on March 2 and 16, 1942. By an Act of March 21, 1942, Congress provided that failure to comply with regulations such as these curfew requirements, issued pursuant to executive order, constituted a misdemeanor. This Court found that General De Witt's regulations were called to the attention of the appropriate Congressional committee prior to the passage of the Act of March 21, 1942, and that the statute's purpose was to provide methods of enforcement for the executive orders and regulations. It was held that the Act of March 21, 1942, precluded all objections of improper delegation since Congress by that Act had ratified and confirmed the prior orders and regulations.

As the Circuit Court of Appeals for the Ninth Circuit said, in *Spaulding* v. *Douglas Aircraft Co., Inc.*, 154 F. 2d 419, at 425:

> The parallel between this case and the *Hirabayashi* case is precise. Here as there a contention is made of delegation of legislative war-making powers. Here as there, action was taken by executive officers of the government which was said to be without proper congressional direction. Here as there, this executive action was brought to the attention of Congress and Congress thereafter passed a statute which

constituted approval of the executive action. And accordingly, here as there, no question of delegation of legislative authority remains open. Whatever difficulties may be found in the original act, the amendments of October 21, 1942, merged the detailed administrative practice with the statute in a manner to foreclose all possibility of further doubt."[34]

3. *The Second Renegotiation Act*

The determination of excessive profits in No. 74 (*Pownall*) was made under the Second Renegotiation Act (Title VII of the Revenue Act of 1943), which expressly lists seven factors to be taken into consideration in determining excessive profits. (Statutory pamphlet, pp. 19–20.) The sufficiency of these statutory standards follows *a fortiori* from the preceding argument on the valid-

[34] That Congress did not make the portion of the Revenue Act of 1943 specifying factors for consideration in determining excessive profits applicable to fiscal years ending prior to July 1, 1943, does not, of course, indicate rejection of the prior administrative practice. As we have shown (*supra*, pp. 78–80), the listing of factors in the Revenue Act of 1943 largely embodies the departmental practice, and the reason the Congress did not extend it to the earlier period was that in general (and with the exception of Tax Court review), the provisions in the Second Renegotiation Act governing renegotiation procedure were to be made applicable only to fiscal years ending after June 30, 1943. S. Rep. No. 627, 78th Cong., 1st Sess., pp. 115–116; H. Rep. No. 871, 78th Cong., 1st Sess., p. 87. For the earlier years, the statutory scheme was to be left unchanged.

ity of the original Act. See, in particular, the cases cited *supra*, pp. 68–69.

D. THE RENEGOTIATION OF EXCESSIVE PROFITS DOES NOT CONSTITUTE A "TAKING" WITHIN THE MEANING OF THE FIFTH AMENDMENT OR AN UNLAWFUL PENALTY

1. "*Taking:*" Petitioners assert that renegotiation is a taking of private property for public use without payment of just compensation, in contravention of the Fifth Amendment. But this is to confuse the Federal Government's regulatory authority under the war powers with its power of eminent domain. Renegotiation is not an exercise of the eminent domain power; Congress was not authorizing requisition or condemnation of private property for use of the armed services but was, on the contrary, establishing a regulatory mechanism to control war profiteering, in order to maintain morale, limit inflation, promote efficiency in war production, and reduce the cost of the war to the nation. The regulatory device employed was the recapture for the public treasury of excessive profits earned out of and ultimately traceable to the public funds appropriated for the carrying on of the war.

Petitioners' contracts were wholly voluntary; their services and products were not requisitioned. Nothing in the Renegotiation Act requires anyone to render services of any character, and the constitutional obligation to make "just compensation" is, therefore, inapplicable. *Bowles* v.

*Willingham,* 321 U. S. 503, 517–518; *Wilson* v. *Brown,* 137 F. 2d 348, 352 (Em. Ct. App.). Nor does it become relevant because petitioners are required to make payments to the Government out of their profits. The Fifth Amendment does not transform the payment of excess profits taxes under an exercise of the taxing power into a "taking" of private property for public use (Cf. *United States* v. *Hudson,* 299 U. S. 498; *Sonzinsky* v. *United States,* 300 U. S. 506), and by like token it does not characterize the recapture of excessive profits under the war powers as a species of eminent domain. Like taxation and property assessments, regulation of the character imposed by the Renegotiation Act has never been viewed as governed by the "taking" clause of the Fifth Amendment. Renegotiation is also akin, as the District Court in No. 95 pointed out (R. 14–15), to maximum price laws, and it is settled that such price-fixing regulations do not constitute a taking of property even though the price established may yield less than a fair return. *Bowles* v. *Willingham,* 321 U. S. 503, 516–519; *Block* v. *Hirsh,* 256 U. S. 135, 155–156.[35]

[35] Compare the cases sustaining pooling arrangements under which money demands are made upon one member of a group to protect the interests of the entire group. *Noble State Bank* v. *Haskell,* 219 U. S. 104; *United States* v. *Rock Royal Co-op.,* 307 U. S. 533, 571–573; *Gray* v. *Commodity Credit Corp.,* 159 F. 2d 243 (C. C. A. 9), certiorari denied, 331 U. S. 842.

As we have already noted (*supra*, p. 56), the requirement of a refund of excessive earnings was approved by this Court in *Dayton-Goose Creek Ry.* v. *United States*, 263 U. S. 456, and in that case the contention of a taking of property without compensation was expressly rejected. The Court sustained the recapture provisions of the Transportation Act of 1920, Sec. 15a, 41 Stat. 488, which required that the earnings of a carrier in excess of 6% of the value of its aggregate property be divided, one half to be retained by the carrier for limited purposes and the other half to be transferred to and used by the Interstate Commerce Commission as a revolving fund to make loans to other carriers. The Commission had determined the aggregate value of the Dayton-Goose Creek road, calculated the amount of profit realized by the road in excess of 6% of that value, and directed that one-half of this amount be paid to the Commission. The order and the statute were attacked as contrary to the Constitution. It was argued that the recapture provision was not a regulation of interstate commerce but a taking of private property without compensation; that if any refund could constitutionally be required, the refund must be to the shippers who had paid the rate charges and not to the United States; that the rates under which the profits were earned were not in fact excessive; that the effect of the statute was to work an

arbitrary discrimination between efficient and inefficient carriers; that the statute made no proper provision for the consideration of deferred liabilities; that recapture of profits arising from both intrastate and interstate business violated the Tenth Amendment; that the actual value of the road was in excess of the value fixed by the Commission.

To all these objections, the Court replied with a sweeping opinion holding in substance that the objective of maintaining an adequate transportation system was, under the Constitution, a legitimate objective of the Federal Government and that the recapture of excessive profits was well adapted to achieve that objective and did not constitute a "taking" of private property. The discussion in this and other opinions relating to the recapture clause[**] is phrased in terms appropriate to that particular regulation of rates under the commerce clause. But the Court's conclusion that the recapture of excessive profits does not constitute a taking of private property applies with equal force to the recovery of excessive profits in the exercise of war powers under the Renegotiation Act.

[**] See *Wisconsin R. R. Commission* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563; *The New England Divisions Case*, 261 U. S. 184; *St. Louis & O'Fallon R. Co.* v. *United States*, 279 U. S. 461; *Richmond, F. & P. R. Co.* v. *McCarl*, 62 F. 2d 203 (App. D. C.).

2. *"Penalty."* In No. 95 (*Alexander*), petitioner calls the Under Secretary's order a "penalty", violative of the Fifth Amendment, imposed upon petitioner not for any acts of its own but because its customers, over whom it had no control, ultimately sold the wool combed by petitioner to a renegotiating Department.[37] But the Act seeks not to *punish* petitioner because the wool it combed finally reached the Government, or because its customers sold their products to the United States, but to recapture excessive profits earned by petitioner which ultimately contributed to the cost of the war. This is a valid legislative purpose regardless of whether petitioner knew the final end of the wool it combed. Excessive profits resulting from the war may properly be eliminated even though the particular taxpayer or contractor may be unaware of the connection,

[37] The prime contracts under which wool combed by petitioner was ultimately used were not always specifically identified, and in some cases may not have been in existence at the time petitioner's services were rendered. See *supra*, pp. 16–18; *infra*, pp. 144–5. These facts were found by the District Court and are not disputed, but it should be pointed out that the "penalty" issue, even though denominated a constitutional one, is probably for the exclusive original jurisdiction of the Tax Court (*infra*, pp. 113 *et seq.*) because petitioner's argument wholly depends on the above facts which it is the province of the Tax Court to find; the contention of invalidity is not based on the face of the Act or of the Under Secretary's order. As we argue below (*infra*, pp. 113 *et seq.*), petitioner's failure to petition the Tax Court bars it from attacking the order on any ground within the Tax Court's exclusive original jurisdiction.

as the excess profits tax makes clear. The only possible argument for nonapplication of a recapture statute to such a subcontractor is that he deliberately chose to do only what he thought to be non-war business, and subsequent changes in his customers' plans, beyond his control, established the connection with the war program. But this argument, even if it were meritorious, cannot avail petitioner which admittedly knew that the mills receiving wool from it were producing largely for the Army and the Navy (R. 30–31), and which at one time certified that all of its production of wool tops was "for United States Army and United States Navy fabric" (R. 30). See *supra*, p. 17, *infra*, pp. 144–145.

E. THE RENEGOTIATION ACT IS VALID AS APPLIED TO PROFITS REALIZED UNDER CONTRACTS ENTERED INTO PRIOR TO THE APPLICABLE DATE OF THE ACT

In No. 105 (*Lichter*), the face of the Under Secretary's order reveals that in determining the petitioners' excessive profits for 1942 he took into consideration four subcontracts entered into prior to April 28, 1942, the enactment date of the first Renegotiation Act (R. 4, 27). No. 74 (*Pownall*) concerns only profits attributable to 1943 (R. 6, 207), and there is no claim that any of the renegotiated subcontracts was entered into before the passage of the Act. In No. 95 (*Alexander*) none of petitioner's subcontracts treated as renegotiable were executed prior to April 28,

1942 (R. 114–115), but several were entered into between that date and October 21, 1942, the date of the retrospective legislative amendment defining the term "subcontract." No. 105 (*Lichter*) is, therefore, the only one of these three cases in which there can properly be raised the claim that the Act invalidly affects agreements existing at the time of enactment, but the petitioners, who argued that issue below, do not appear to present it here. On the other hand, petitioners in Nos. 74 (*Pownall*) and 95 (*Alexander*), who are not in a position to make such a claim of retroactivity, attempt to raise it vigorously; in addition, petitioner in No. 95 (*Alexander*) urges that its subcontracts were first made subject to renegotiation by the retrospective Act of October 21, 1942, which it contends cannot constitutionally apply to agreements executed between April 28 and October 21.

Although the *Lichter* case, the only one the facts of which actually present the issue of retroactivity, does not bring it forward here, we shall discuss the question, as well as the related minor issues raised by the circumstances of the other two cases, because of the importance of the issue and its urgent presentation by petitioners in Nos. 74 (*Pownall*) and 95 (*Alexander*). The renegotiation orders upon which the Government sues, in *Lichter*, plainly show upon their face that preexisting contracts were considered in renegotia-

tion, and we do not contend that the contractor is precluded, by failure to petition the Tax Court, from attacking the Act's validity on the ground of retroactivity. See *supra*, p. 30, *infra*, pp. 113, 128.

1. *Application of the Act to contracts entered into prior to April 28, 1942.* As of April 28, 1942, there were outstanding uncompleted war contracts of a value considerably in excess of $50,000,000,000 (Patterson affidavit, pars. 37–38). Many of these contracts had substantial periods yet to run.[28] Furthermore, since they were entered into during the first two years of the national defense war period, when the difficulties of pricing were greatest and the necessity for speed was most imperative, it was with respect to such contracts that renegotiation was most necessary. A program for the control of war profiteering which did not reach this aggregate of agreements would scarcely have been effective.

a. *Contracts with private persons.* All of petitioners' contracts were with private persons, and

[28] The ship construction program of the Navy was particularly important. In the summer of 1940 the Congress had authorized naval expansion programs of 11% and then 70%. The contracts in the main were executed by March of 1941 (Hensel affidavit, par. 41; cf. Patterson affidavit, par. 39). Most of these contracts were not completed until the latter part of 1942 and the early part of 1943. The construction of a battleship normally requires 32 to 35 months, of a carrier 17 to 21 months, and of a cruiser 22 to 25 months. It was apparent in April 1942 that the war profits realized from this naval expansion program would be exempt from recapture unless the statute was made applicable to existing agreements.

none directly with the Government. Settled doctrine permits the United States to extend renegotiation to such agreements existing on April 28, 1942, and wholly or partially executory.[*]

(1) The Constitution "contains no prohibition of retrospective legislation as such, and therefore * * * the mere fact that a statute is retroactive in its operation does not make it repugnant to the Federal Constitution." *League* v. *Texas*, 184 U. S. 156, 161; *Calder* v. *Bull*, 3 Dall. 386; *Watson* v. *Mercer*, 8 Pet. 88, 109; *Blount* v. *Windley*, 95 U. S. 173, 180. From early days, this Court has sustained the validity of much legislation having a retroactive effect on existing property rights. *Watson* v. *Mercer*, *supra*; *Curtis* v. *Whitney*, 13 Wall. 68.[**] Contract rights, already accrued through partial or total execution of the contract involved, are no less immune from proper legislative interference even

[*] The lower courts have all indicated that the Act is valid in this respect. *Spaulding* v. *Douglas Aircraft Co., Inc.*, 154 F. 2d 419, 426 (C. C. A. 9); opinion of Judge Yankwich in No. 74, R. 202–205, 65 F. Supp. 147, 150–151; opinion of Judge Wyzanski in No. 95, R. 17, 66 F. Supp. 389, 393; conclusions of Judge Druffel in No. 105, R. 28–29; 68 F. Supp. 19, 20; opinion of the Circuit Court of Appeals in No. 105, R. 45, 160 F. 2d 329, 332.

[**] See Smith, *Retroactive Laws and Vested Rights* (1927) 5 Tex. L. Rev. 231 (1928), 6 Tex. L. Rev. 409, reprinted in 2 Association of American Law Schools, Selected Essays on Constitutional Law, p. 266; Hale, *The Supreme Court and the Contract Clause* (1945), 57 Harv. L. Rev. 512, 621, 852; Wright, *The Contract Clause of the Constitution*.

though such accrued rights will be limited or destroyed. "The sovereign right of the Government is not less because the property affected happens to be a contract" (*Calhoun* v. *Massie*, 253 U. S. 170, 176); "when contracts deal with a subject matter which lies within the control of the Congress", their "continuing operation" may in proper cases be modified or prohibited by subsequent legislation. *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240, 307–8, 309, 310.

(2) While this Court has been vigilant in safeguarding private contract rights from arbitrary legislative interference, nevertheless where the Congress in the exercise of an admittedly granted power has adopted a means reasonably adapted to achieve a legitimate end, such legislation has withstood constitutional challenge even though the effect is to set aside or reduce the value of accrued contract rights. In the *Norman* case, *supra*, a statute precluding gold payments was held enforceable against a bondholder who had bought and paid for his gold clause bonds prior to the statute's enactment. In *Calhoun* v. *Massie*, 253 U. S. 170, the Court upheld an act limiting attorneys' fees for collection of a claim against the Government to an amount substantially less than that contracted for, even though the attorney had already performed substantially all of the services required by his contract. Cf., for similar result, *Capital Trust Co.* v. *Calhoun*, 250 U. S. 208, 218.

*Louisville & Nashville R. R.* v. *Mottley,* 219 U. S. 467, enforced a federal statute which invalidated a prior contract, valid when made, by which a railroad agreed to issue annual passes for life in consideration of an executed full release of the pass holder's damage claims against the railroad. Similarly, in *Philadelphia, B. & W. R. Co.* v. *Schubert,* 224 U. S. 603, the Employers' Liability Act was held validly to have abrogated a contract by which railroad employees agreed to accept benefits from a "Relief Fund," to which the railroad contributed, in lieu of all claims against the company. In *Wright* v. *Union Central Insurance Co.,* 304 U. S. 502, 515–516, the Court sustained a section of the Bankruptcy Act which extended the period for enforcing an equity of redemption, long after the mortgagee had advanced his money to the mortgagor. Rental contracts have also been made subject to subsequent legislative alteration of their terms. *Block* v. *Hirsh,* 256 U. S. 135; *Bowles* v. *Willingham,* 321 U. S. 503. In all of these cases, and others, the subject matter being within Congressional power, the legislation was upheld, notwithstanding the cancellation or reduction in value of accrued contract rights.

(3) This Court has likewise sustained the validity of state legislation substantially reducing or eliminating the value of "vested" contract rights, as consistent with the Constitutional clause prohibiting impairment of contract obligations which

applies in terms only to the states. *East New York Savings Bank* v. *Hahn,* 326 U. S. 230 (statute suspending mortgagor's right of foreclosure, applied to mortgage executed prior to the Act); *Faitoute Iron & Steel Co.* v. *City of Asbury Park,* 316 U. S. 502 (municipal insolvency statute, applied to preexisting bonds and interest coupons, so as to give creditor less than stipulated interest); *Gelfert* v. *National City Bank,* 313 U. S. 221 (statute permitting scaling down of deficiency judgment after foreclosure sale of mortgaged property—applied to mortgagee who, under law existing when mortgage was executed, was entitled to full deficiency judgment); *Veix* v. *Sixth Ward Assn.,* 310 U. S. 32 (statute limiting right of purchaser of shares in building and loan association to withdraw such shares); *Honeyman* v. *Jacobs,* 306 U. S. 539 (statute prohibiting deficiency judgment where mortgagee has bid in property at foreclosure sale and value of property equals the indebtedness—applied to default occurring before the Act); *Richmond Corp.* v. *Wachovia Bank,* 300 U. S. 124 (statute, as applied to notes and deed of trust executed prior to Act, providing that where mortgagee buys in the property for less than mortgage indebtedness, his suit for deficiency may be defended on ground that value of the property equalled the debt); *Home Building & Loan Association* v. *Blaisdell,* 290 U. S. 398 (mortgage moratorium law extending period of redemption, applied to foreclosure occurring prior to

Act); *Marcus Brown Holding Co.* v. *Feldman,* 256 U. S. 170 (rent control act barring actions to recover possession, applied to lease expiring prior to Act and including covenant to surrender possession on expiration of lease); *Pennsylvania Hospital* v. *Philadelphia,* 245 U. S. 20 (municipality permitted to open street through hospital grounds, despite outstanding contract under which hospital corporation had made payments of money and furnished ground for a designated street in return for agreement forbidding opening of any street through the hospital grounds without hospital's consent).

(4) The legal theories upon which this Court has permitted invasion of accrued contract rights have varied considerably. Thus it has been said that the statute merely touches upon the remedy rather than upon the contract right itself (*Richmond Corp.* v. *Wachovia Bank,* 300 U. S. 124; *Honeyman* v. *Jacobs,* 306 U. S. 539); or that a "reservation of essential attributes of sovereign power is * * * read into contracts as a postulate of the legal order" (*Home Building & Loan Ass'n* v. *Blaisdell,* 290 U. S. 398, 435); or that there has been "an exercise of the sovereign right of the Government to protect the * * * general welfare of the people," a power which is "paramount to any rights under contracts between individuals" (*Manigault* v. *Springs,* 199 U. S. 473, 480); or that "when contracts deal with a subject matter which lies within the control of the Con-

gress, they have a congenital infirmity" (*Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240, 307–308); or that the subject matter of the legislation had already been the subject of regulation in some past period (*Veix* v. *Sixth Ward Assn.*, 310 U. S. 32). But, as this Court recently observed, "the formal mode of reasoning [in these cases] * * * is of little moment"; they yield "this governing constitutional principle: when a widly diffused public interest has become enmeshed in a network of multitudinous private arrangements, the authority of the State 'to safeguard the vital interests of its people' * * * is not to be gainsaid by abstracting one such arrangement from its public context and treating it as though it were an isolated private contract constitutionally immune from impairment" (*East New York Savings Bank* v. *Hahn*, 326 U. S. 230, 232). While this was said with reference to exercise of the "police power" of the States, the same may be said of the exercise of the Federal war power which is at least as broad as the "police power" of the States (*Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 156).

(5) These principles and these authorities are squarely applicable here. The "subject matter" of the Renegotiation Act is well within Congress' war powers, as we have shown (supra, pp. 53–56). Petitioners' subcontracts are war contracts subordinate to prime contracts with the War or Navy Departments. Congress saw fit, in the ex-

ercise of its war powers, to decline to permit war contractors to retain excessive profits. Because of the tremendous volume of war contracts outstanding at the time it passed the Renegotiation Act (*supra*, p. 90), Congress chose to apply its policy to all existing war contracts, whatever the extent to which the contractor's rights had "accrued" or his obligations been performed. The reduction in the value of the contractor's rights which the Act imposed no more invalidates it than did the reduction in the value of the accrued contractual rights in the many cases mentioned above outlaw those statutes. For instance, the limitation of excessive net profits obviously affects the operation of previous contracts much less than a direct alteration of stipulated rentals (*Bowles* v. *Willingham*, 321 U. S. 503) or the measure of payment in gold-clause bonds (*Norman* v. *B. & O. R. Co.*, 294 U. S. 240).

(6) On all fours with the recovery of net profits under pre-existing contracts by renegotiation is retroactive income taxation, which has long been held valid.[41] As the Ninth Circuit said

[41] See 1 Mertens, *Law of Federal Income Taxation* (1942), Sec. 4.15; Ballard, *Retroactive Federal Taxation* (1935), 48 Harv. L. Rev. 592; *Untermyer* v. *Anderson*, 276 U. S. 440, 447–454 (Brandeis, J., dissenting). *Cooper* v. *United States*, 280 U. S. 409, 411–412; *Burnet* v. *Wells*, 289 U. S. 670, 682–3; *United States* v. *Hudson*, 299 U. S. 498, 500; *Welch* v. *Henry*, 305 U. S. 134, 146–149; *Illinois Central R. Co.* v. *Minnesota*, 309 U. S. 157, 165; cf. *Milliken* v. *United States*, 283 U. S. 15, 21–22 (gift tax).

in *Spaulding* v. *Douglas Aircraft Co., Inc.*, 154 F. 2d 419, 423: "* * * the power in war to recapture for the war treasury excessive profits from existing contracts is certainly as great as the power in peace to tax in a succeeding year the income earned prior to the tax legislation." In particular, this Court's decisions in *Welch* v. *Henry*, 305 U. S. 134, and *United States* v. *Hudson*, 299 U. S. 498, amply sustain the application of the Renegotiation Act to "recent transactions" (*Welch* v. *Henry, supra*, at 150; *Cooper* v. *United States*, 280 U. S. 409, 411) between petitioners and their private customers. In the *Welch* case, the Court upheld the retroactive application of a Wisconsin tax statute to net income received two years before the passage of the taxing statute. The Wisconsin law in force in 1933 allowed the taxpayer to deduct from gross income dividends received from corporations whose principal business was attributable to Wisconsin. In 1933, the taxpayer received such dividends. On March 27, 1935, the state laid new taxes for the years 1933 and 1934 and, among other things, imposed a tax on the dividends which had previously been exempt. Wisconsin was, therefore, by a law enacted in March 1935, reaching income realized as early as January 1933, some two years and three months before—a period of retroactivity much longer than that involved here.[42] This Court

[42] The earliest subcontract in any of the instant cases is dated March 30, 1942 (No. 105, R. 4, 27). By that time, the

held the Wisconsin statute constitutional. The cases in which certain retrospective gift taxation had been invalidated (*Nichols* v. *Coolidge*, 274 U. S. 531; *Blodgett* v. *Holden*, 275 U. S. 142; *Untermyer* v. *Anderson*, 276 U. S. 440; *Coolidge* v. *Long*, 282 U. S. 582) were distinguished on the ground that there the donor might have refrained from making the gift had he known or anticipated the tax, but it could not be said that the taxpayer would have been deterred from receiving income by knowledge that it might thereafter be taxed (305 U. S. at 147–8). *United States* v. *Hudson*, 299 U. S. 498, sustained the Silver Purchase Act of June 19, 1934 (48 Stat. 1178, 26 U. S. C. 904 (a)) which imposed a tax of 50 per cent of the profits on any transfer of silver bullion made on and after May 15, 1934.[43]

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Case Amendment limiting profits on war contracts to 6% had been adopted by the House of Representatives, and limitation of war profits by some sort of renegotiation was being actively considered. See *supra*, pp. 45–47. Cf. *United States* v. *Hudson*, 299 U. S. 498, 501. *Milliken* v. *United States*, 283 U. S. 15, 22–24; see *infra*, pp. 106–108.

[43] The Revenue Act of 1936 (49 Stat. 1648, 1734, Title III, enacted June 22, 1936) levied a "tax on unjust enrichment" of 80 per cent on income derived from federal excise taxes which had been passed on to others but which the taxpayer was not called upon to pay because the Agricultural Adjustment Act (7 U. S. C. 601 *et seq.*) was declared unconstitutional (in *United States* v. *Butler*, 297 U. S. 1, and *Rickert Rice Mills, Inc.* v. *Fontenot*, 297 U. S. 110, decided January 1936), or which were refunded to the taxpayer and not repaid to those who had actually borne the invalid excise tax. This "windfall tax," which reached back from six to sixteen months, was sustained by the lower courts in *Steinhagen*

It seems clear that if Wisconsin can reach back over a period of more than two years to recapture by taxation ordinary profits on transactions long since completed, Congress can, by an exercise of the war powers, reach back over a much shorter period to recapture profits inflated by war and taken at public expense. These tax cases show that the profits realized in "recent transactions" may be reached retroactively where there is rational basis for such retrospective legislation. In this view, Congress could reasonably have applied the Renegotiation Act to profits realized out of war contracts since at least December 7, 1941. For, as we have shown, the compelling necessity of maintaining the morale of the armed forces and civilian war workers, and of protecting the public treasury by eliminating excessive war profits, applied to profits realized as a result of the war effort before April 28, 1942, as well as thereafter. Congress elected, however, to limit the Act's application to those contracts existing at the date of passage, and a rational basis certainly existed for that restricted degree of retroactivity. The rea-

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*Rice Milling Co.* v. *Scofield*, 87 F. 2d 804 (C. C. A. 5); *White Packing Co.* v. *Robertson*, 89 F. 2d 775 (C. C. A. 4); *Sportwear Hosiery Mills* v. *Commissioner*, 129 F. 2d 376 (C. C. A. 3); *Wilson Milling Co.* v. *Commissioner*, 138 F. 2d 249 (C. C. A. 8); *Unign Packing Co.* v. *Rogan*, 17 F. Supp. 934 (S. D. Cal.); *Kingan & Co., Inc.* v. *Smith*, 17 F. Supp. 217 (S. D. Ind.); *Louisville Provision Co.* v. *Glenn*, 18 F Supp. 423 (W. D. Ky.). Cf. *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337.

sonable expectations of the contractor are defeated no more by the retrospective aspect of the Renegotiation Act than by retroactive income tax statutes whose validity is beyond question. And the advancement of the war through prevention of excessive war profits is surely no less a justification for reaching back to recapture such profits than that of making an equitable distribution of the cost of government, which is the general aim of these tax acts (*Welch* v. *Henry*, 305 U. S. at 146, 149). So far as concerns the statute's retroactive reach, it is, therefore, no more improper to eliminate excessive profits by renegotiation under the war powers than by ordinary methods of taxation."

b. *Contracts with the United States.* None of the contracts involved in these three cases was made with the United States, and no issue is therefore presented as to the validity of the Act's retroactive application to profits realized under contracts with agencies of the United States in effect before April 28, 1942. But the same reasons which sustain the Act in its effect upon private contracts entered into before that date support the validity of its retrospective application

" Note may be made that taxing acts are required by the Constitution to be uniform (Art. I, Sec. 8, Cl. 1), but this requirement is solely one of geographic uniformity (*Billings* v. *United States*, 232 U. S. 261, 282), which is satisfied by the Renegotiation Act.

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to Government agreements. See *supra*, pp. 90–101. The contrary contention rests wholly on the argument that, whatever the rule as to private contracts, the United States has power to make binding contracts, and that having entered into a contract with fixed prices, the Government is precluded from altering the contract's terms by subsequent legislation or by administrative action pursuant to such legislation. Cf. *Perry* v. *United States*, 294 U. S. 330, and *Lynch* v. *United States*, 292 U. S. 571. Upon analysis, the argument completely dissolves.

(1) Like a net income tax, a renegotiation order does not directly alter or modify any terms of the renegotiated contracts. The Secretary does not modify the price,[46] but orders payment to the United States of a certain portion of the net profits realized on all renegotiable business for the period covered, including profits flowing from contracts with Government agencies. Profits, of course, are not the same thing as prices, nor are they directly correlated with particular prices where a contractor's business is renegotiated as a whole. In short, the contracts are performed according to their terms; excessive profits must be repaid only if such profits are realized on the renegotiable business. If, for example, suit were

[46] The original Act did authorize repricing, but the authority was rarely, if ever, used. The Second Act separated the repricing authority from renegotiation. See Revenue Act of 1943, Title VIII.

brought on a contract, a renegotiation order would not constitute a defense to the suit, but, as in the case of a claim for taxes, could serve only as a basis for set-off for money owing to the United States.

(2) In any event, the Constitution certainly does not prohibit every congressional modification of the terms of federal contracts. In *Lynch* v. *United States*, 292 U. S. 571, the Court recognized that Congress, no less than the states, has power to modify federal contracts if "the action taken falls within the federal police power or some other paramount power" (at p. 579). That such power may be exercised in appropriate circumstances was expressly held in *Horowitz* v. *United States*, 267 U. S. 458, 461 (government's delay in shipment resulting from wartime embargo order) and *North American Commercial Co.* v. *United States*, 171 U. S. 110, 137 (governmental regulation reducing number of seals to be taken by sealing concessionnaire of United States). In this view, the public interest served by the Renegotiation Act and the need for its retrospective application (*supra*, pp. 90, 96–97, 100–101) are sufficient to validate the application of the Federal Government's "paramount" war powers to pre-existing contracts. Moreover, it has never been doubted that a retroactive income tax may be extended to profits earned under contracts with the United States. Cf. *Providence Bank*

v. *Billings*, 4 Pet. 514, 561; *United States Trust Co.* v. *Helvering*, 307 U. S. 57, 60–61. There is no reason why recapture of excessive war profits through renegotiation should be terated differently.

(3) The *Lynch* and *Perry* cases are plainly distinguishable. In the *Lynch* case the statute held invalid completely repudiated the obligations expressly assumed in contracts of personal insurance, and this for no better reason than to save the Government money. 292 U. S. at 579–580. In the *Perry* case, Congress annulled a gold-clause obligation which was inserted by the parties, under express Congressional authorization, in specific contemplation of, and deliberately intended to guard against, the very contingency of depreciated payment which the gold-clause statute was designed to require. The Renegotiation Act would present the same case only if Congress had previously authorized the inclusion in war procurement contracts of an undertaking never to renegotiate excessive profits under public contracts. Furthermore, the *Perry* case appears to relate only to the federal borrowing power and not to the regulation of Government matériel procurement obligations, especially in wartime.

2. *Application of the Act to subcontracts entered into between April 28, 1942, and October 21, 1942.* No. 95 (*Alexander*) presents agreements entered into between April 28, 1942 and October

21, 1942, which the petitioner claims were not "subcontracts" under the act as originally passed but which are admitted to be covered by the legislative definition of "subcontract" in the Act of October 21, 1942." The particular prime contracts under which the wool processed by petitioner was used were not in all cases identifiable, and may not have been in existence at the time petitioner delivered the processed wool (*supra*, pp. 16–18); accordingly, petitioner contends, its agreements were not "subcontracts" under the original Act because that term requires that services be rendered for "identified" and preexisting prime contracts; if the Act be applied to agreements consummated before the passage of the clarifying Act of October 21, 1942, it is retroactive and invalid.

a. We show below, *first*, that the Tax Court was the tribunal in which to test the meaning of the term "subcontract" in the original Act (*infra*, p. 113); *second*, that petitioner's election not to

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" As originally enacted, the Renegotiation Act extended to "subcontracts" (Section 403 (c)) but did not define the term. The Act of October 21, 1942 (Section 403 (a) (5)), defined the term as follows:

"The term 'subcontract' means any purchase order or agreement to perform all or any part of the work, or to make or furnish any article, required for the performance of another contract or subcontract. The term 'article' includes any material, part, assembly, machinery, equipment, or other personal property."

This amendment was made retroactive to April 28, 1942.

petition the Tax Court constituted a waiver of all claim to improper inclusion of petitioner's agreements in renegotiation, or of misconstruction of the statute (*infra*, p. 122); and, *third*, that in any case the term "subcontract" in the original Act covered petitioner's agreements (*infra*, p. 140). This being so, petitioner is not in a position to claim any retroactive application of the Act, and is left without claim that its constitutional rights have been invaded on that score.

b. The lower courts in No. 95 took one further step and held (R. 17, 241) that the place to have raised the issue of retroactivity was the Tax Court, and that petitioner's failure to do so barred it from raising the issue here. Since the constitutional issue cannot be reached until after determination of the issue of statutory coverage, which is clearly within the exclusive jurisdiction of the Tax Court under *Macauley* v. *Waterman Steamship Corp.*, 327 U. S. 540 (*infra*, p. 113), the lower courts' view may well be correct.

c. If, however, the constitutional issue be deemed to be properly here, it need give but little pause. The inclusion of "subcontracts" in the original Act should, at the least, have warned petitioner that its agreements, if not already covered by the Act, might thereafter be retroactively included by a slight modification of the statute. See *infra*, pp. 140–144. In these circumstances, the Act of October 21, 1942, could not have been an un-

reasonable or arbitrary, or even an unanticipated, interference with petitioner's expectations, and its validity is hardly doubtful. Cf. *United States* v. *Hudson*, 299 U. S. 498, 501; *Veix* v. *Sixth Ward Assn.*, 310 U. S. 32, 38; *Milliken* v. *United States*, 283 U. S. 15, 22–24.

3. *Application of the Second Renegotiation Act to contracts entered into prior to February 25, 1944.* The special claim in No. 74 (*Pownall*) is that the Second Renegotiation Act (enacted February 25, 1944) cannot validly apply to petitioner's business for the calendar year 1943 (*supra*, p. 88). The supporting argument appears to be that the original Act, which existed throughout 1943, was totally void, and therefore when the Second Act became effective in February 1944, and was applied to renegotiable business done during 1943, it was improperly made to govern preexisting contracts not theretofore subject to any valid renegotiation statute. The fallacy is transparent. Even if the first Act were wholly unconstitutional, it constituted a standing reminder to petitioner that Congress was intensely concerned with the recapture of excessive war profits, and intended to use renegotiation as the vehicle.[47] If the initial Act was as defective as petitioners claim, it should have been plain to them that Congress would seek to improve it and to transform the allegedly void

[47] The original Act was amended three times during 1942 and 1943. *Supra*, pp. 27–28.

statute into a constitutional act. Profits on war business were obviously a prime object of legislative regulation, and when petitioners made war contracts in 1943, they made them "subject to further legislation upon the same topic." *Veix* v. *Sixth Ward Assn.*, 310 U. S. 32, 38; cf. *United States* v. *Hudson*, 299 U. S. 498, 501; *Milliken* v. *United States*, 283 U. S. 15, 22–24.

E. THE RENEGOTIATION ACT DOES NOT DENY PETITIONERS PROCEDURAL DUE PROCESS

Some claim is made that the Under Secretary's orders are invalid on their face because they were made without a "full hearing," and also because judicial review is alleged to be precluded by the Act.

1. *Hearing.* a. The Act, as amended by the Revenue Act of 1943, does not require a full hearing before issuance of the renegotiation order. It was for that very reason that a trial *de novo* in the Tax Court was authorized by the Revenue Act of 1943. Opposition had been voiced against granting such a trial. The then Senator Truman objected that "it is not its [the court's] proper function to try to do the job all over again" (90 Cong. Rec. 531), and offered an amendment providing for review to be had on the basis of a statement furnished by the War Price Adjustment Board as to the reasons for its decision (90 Cong. Rec. 531, 535). Senators George and Clark objected to this proposal upon the ground that

adequate review could only be had on a full and formal record; that, therefore, "either a record must be kept in the hearing below * * * before the Board * * * or else a trial *de novo* must be had" (90 Cong. Rec. 534); and that "the administrative officers * * * much prefer to have a proceeding *de novo* in some court, rather than to have the Board keep a record" with the resulting "slowing down and bogging down" of "the whole renegotiation system" (90 Cong. Rec. 534). The Truman amendment was accordingly rejected (*id.* 535). It was understood by all that if a contractor desired a full hearing, with all the safeguards required by due process, he could obtain it in the Tax Court.

b. The statute so read is plainly valid. The "demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding." *Opp Cotton Mills* v. *Administrator,* 312 U. S. 126, 152–153. It is enough if at some stage the requisite hearing is available to a protestant. *Opp Cotton Mills* v. *Administrator, supra; Utley* v. *St. Petersburg,* 292 U. S. 106, 109–110; *Phillips* v. *Commissioner,* 283 U. S. 589, 596–597; *Yakus* v. *United States,* 321 U. S. 414, 436, 442–443; *Bowles* v. *Willingham,* 321 U. S. 503, 519–520. This Court has sustained statutes providing for tentative tax or benefit assessments with opportunity for a subsequent full hearing

on application of a taxpayer objecting to the initial assessment (*Farncomb* v. *Denver*, 252 U. S. 7, 11; *Milheim* v. *Moffat Tunnel Dist.*, 262 U. S. 710, 723; *Utley* v. *St. Petersburg*, 292 U. S. 106, 109–110) and has upheld summary proceedings for the actual collection of taxes without prior hearing, if an adequate opportunity for later judicial determination is accorded. *Phillips* v. *Commissioner*, 283 U. S. 589, 595–597, and cases cited. The Renegotiation Act, as amended to establish Tax Court redetermination, is equally unobjectionable, at least where, as in these three cases, the renegotiation order is not sought to be enforced until the time for petitioning the Tax Court has expired.

c. Petitioners' contention that the Under Secretary's orders were void because he considered undisclosed evidence and failed to make findings falls with the major premise that the Department was required to provide a full hearing in advance of the issuance of the orders. The Tax Court hearing was established in order to correct any defects in the Departmental proceeding. As the District Court observed in *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 62 F. Supp. 520, 524 (D. C. D. C.), affirmed, 331 U. S. 752: "So far as the administrative proceeding is concerned, any defects in the hearing before the War Contracts Price Adjustment Board are immaterial so long as the plaintiff obtains a full hearing before the Tax Court of the United States." And as Mr. Justice Cardozo said

in *Utley* v. *St. Petersburg*, 292 U. S. 106, 109: "This court will not listen to an objection that the charge has been laid in an arbitrary manner when an administrative remedy for the correction of defects or inequalities has been given by the statute and ignored by the objector." See also *Carter* v. *Kubler*, 320 U. S. 243, 247–9 (conciliation commissioner's improper consideration of his own personal investigations in determining property values, cured by independent determination by District Court on basis of evidence presented by parties).

d. For these reasons, the nature of the Departmental proceedings is legally immaterial, but it should be added that the renegotiating agencies have followed the implications of the term "renegotiation,"[46] and have been careful to give contractors ample opportunity to present evidence and argument. See Patterson affidavit, par. 46. This was apparently the procedure followed in the instant cases (cf. No. 74, R. 207; No. 95, R. 112–115; No. 105, R. 14).

2. *Judicial review:* Decision has been reserved by this Court upon the question of the finality of Tax Court redeterminations (*Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752, 771),

[46] It is plain, however, that if agreement cannot be reached with a contractor, the renegotiating agencies are authorized to issue unilateral determinations of excessive profits (Revenue Act of 1942, Title VIII, Section 403 (a) (3), statutory pamphlet p. 6; Revenue Act of 1943, Title VII, Section 403 (c) (1), statutory pamphlet, pp. 28–29).

and it remains open to what extent judicial review was intended to be precluded, and whether that may validly be done. Nor need those issues be determined in these proceedings. Even if Congress intended to foreclose judicial review of Tax Court decisions, and that were improper, petitioners would have no present cause to complain. They are neither hurt nor aided in this litigation by such a reading of the statute: (1) they failed to petition the Tax Court and therefore have no redeterminations which could be cut off from judicial review by the condemned clause; (2) *Macauley* v. *Waterman Steamship Co.*, 327 U. S. 540, 545, and the *Aircraft* case, *supra*, explicitly state that no excuse for failing to exhaust the administrative remedy can be found in the alleged invalidity of the provision precluding judicial review; (3) direct judicial review of the Under Secretary's orders cannot be had because the Tax Court is the sole forum for redetermination, as we show below (*infra*, pp. 113 *et seq.*), regardless of whether judicial review would have been available upon completion of that proceeding. Certainly, invalidity of this statutory provision would not carry with it either the entire Act or the requirement of resort to the Tax Court. The finality provision is clearly separable (*Stein Bros. Mfg. Co.* v. *Secretary of War*, 7 T. C. 863, 882–3); the Act contains a separability provision (Section 403 (g)); and, if the Constitution so requires, the

finality clause may be set aside and judicial review may be provided after hearing in the Tax Court.[49]

II. PETITIONERS' FAILURE TO PETITION THE TAX COURT RENDERS THE UNDER SECRETARY'S ORDERS FINAL ON ALL ISSUES OF COVERAGE AND AMOUNT

A. THE TAX COURT HAS EXCLUSIVE ORIGINAL JURISDICTION TO DETERMINE WHETHER PETITIONERS' AGREEMENTS ARE SUBJECT TO RENEGOTIATION, AND THE AMOUNT OF EXCESSIVE PROFITS REALIZED

Section 403 (e) of the Act, as amended by the Revenue Act of 1943, provides for a redetermination in the Tax Court of determinations on orders of the Secretaries or of the War Contracts Price Adjustment Board. Subsection (e) (1) governs orders concerning fiscal years ending after June 30, 1943, and subsection (e) (2) controls those involving the earlier fiscal years.[50] In both cases,

[49] Issues of the validity of the Act on its face, in contrast to the validity of the Under Secretary's orders, are being mooted here, and the Government does not oppose their determination, even though petitioners failed to petition the Tax Court. See *supra*, pp. 30, 89–90; *infra*, p. 128.

[50] No. 74 (*Pownall*) falls under section 403 (e) (1); Nos. 95 (*Alexander*) and 105 (*Lichter*) under section 403 (e) (2). These provisions are as follows:

> (e) (1) Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c) (1), file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclu-

the statute provides that upon the filing of a petition for redetermination, the Tax Court "shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or

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sive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. For the purposes of this subsection the court shall have the same powers and duties, insofar as applicable, in respect of the contractor, the subcontractor, the Board and the Secretary, and in respect of the attendance of witnesses and the production of papers, notice of hearings, hearings before divisions, review by the Tax Court of decisions of divisions, stenographic reporting, and reports of proceedings, as such court has under sections 1110, 1111, 1113, 1114, 1115 (a), 1116, 1117 (a), 1118, 1120, and 1121 of the Internal Revenue Code in the case of a proceeding to redetermine a deficiency. In the case of any witness for the Board or Secretary, the fees and mileage, and the expenses of taking any deposition shall be paid out of appropriations of the Board or Department available for that purpose, and in the case of any other witnesses, shall be paid, subject to rules prescribed by the court, by the party at whose instance the witness appears or the deposition is taken. The filing of a petition under this subsection shall not operate to

agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined" by the Board or the Secretary. "A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination" of the

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stay the execution of the order of the Board under subsection (c) (2).

(2) Any contractor or subcontractor (excluding a subcontractor described in subsection (a) (5) (B)) aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July 1, 1943, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of the enactment of the Revenue Act of 1943, file a petition with The Tax Court of the United States for a redetermination thereof, and any such contractor or subcontractor aggrieved by a determination of the Secretary made on or after the date of the enactment of the Revenue Act of 1943, with respect to any such fiscal year, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of such determination, file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have the same jurisdiction, powers, and duties, and the proceeding shall be subject to the same provisions, as in the case of a petition filed with the court under paragraph (1), except that the amendments made to this section by the Revenue Act of 1943 which are not made applicable as of April 28, 1942, or to fiscal years ending before July 1, 1943, shall not apply.

Board or the Secretary, "but shall be treated as a proceeding de novo."

1. *Nature of the Tax Court remedy:* In *Macauley* v. *Waterman Steamship Corporation*, 327 U. S. 540, and *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752, upon examination of the statutory language and review of the legislative history, the Court concluded that Congress had provided for Tax Court redetermination in order to secure "uniformity of administrative policy and disposition," "expertness of judgment", and at least a "very large degree of finality" in determination (331 U. S. at 767–769; 327 U. S. at 544–545). It was expressly held that the Tax Court had full authority to determine issues of coverage and exemption such as petitioners raise. It was also held that Congress intended contractors unwilling to accept determinations made by a Secretary or the Board to proceed directly to the Tax Court for relief. Petitioners were therefore bound to petition the Tax Court if they desired further contest of the orders issued against them. Every objection which they urge against the Under Secretary's orders could have been made in the Tax Court, and, if valid, corrected there.

2. *Resort is not optional:* Disregarding this plain legislative purpose, petitioners in Nos. 95 (*Alexander*) and 105 (*Lichter*) contend that in renegotiations involving fiscal years ending prior

to July 1, 1943, the Act gives the contractor the option of resorting to the Tax Court or of employing the District Court to review the Departmental determination. Petitioners' argument rests solely on certain variations in the wording of the statute. They point out that Section 403 (e) (2) (*supra*, p. 115), relating to Tax Court review of determinations for fiscal years ending prior to June 30, 1943, provides that an aggrieved contractor *may* file a petition in the Tax Court. They then contrast this "permissive" language with the terms of Section 403 (c) (1)[31] which empowers the War Contract Price Adjustment Board to enter orders determining excessive profits for fiscal years ending after June 30, 1943, and provides that "In the absence of the filing of a petition with The Tax Court of the United States under the provisions of and within the

[31] Section 403 (c) (1), which governs only determinations for fiscal years ending after June 30, 1943, provides in part as follows:

> If the Board does not make an agreement with respect to the elimination of excessive profits received or accrued, it shall issue and enter an order determining the amount, if any, of such excessive profits, and forthwith give notice thereof by registered mail to the contractor or subcontractor. In the absence of the filing of a petition with The Tax Court of the United States under the provisions of and within the time limit prescribed in subsection (e) (1), such order shall be finally and conclusive and shall not be subject to review or redetermination by any court or other agency.

time limit prescribed in subsection (e) (1) [Section 403 (e) (1), *supra*, pp. 113–114, fn. 50], such order shall be final and conclusive and shall not be subject to review or redetermination by any court or other agency." The omission of similar language with respect to determinations involving fiscal years ending on or before June 30, 1943 is said to make the provision for Tax Court review of these determinations merely "permissive" and "optional" so that petitioners could elect to obtain their review on trial *de novo* in the district courts.

It is true that the provision of Section 403 (c) (1), giving finality in terms to renegotiation orders in the absence of timely appeal to the Tax Court, was not extended to orders for fiscal years ending prior to July 1, 1943. But in the *Waterman* case, where the contracts sought to be renegotiated were all completed prior to July 1, 1943 (Transcript of Record, No. 435, October Term, 1945, pp. 5–7), this Court held that the Tax Court's jurisdiction to decide questions of fact and law, including issues of coverage, was "exclusive," and the contractor was therefore required to initiate and exhaust his Tax Court remedy (327 U. S. at 544–545). Similarly, *Wade* v. *Stimson*, 331 U. S. 793, held that a contractor challenging a renegotiation order for 1942 must complete his Tax Court proceedings. And it is clear that the use of different wording by Congress reflects no intention to distinguish in this

respect between orders for different fiscal years.[52] The intention to require resort to the Tax Court in all cases is clear from the Revenue Act's legislative history,[53] and confirmed by the fact that, in making the Tax Court remedy available for fiscal years ending before July 1, 1943, Congress provided that in such cases the court "shall have the same jurisdiction, powers, and duties" as in

[52] In the Revenue Act of 1943, Congress completely rewrote the procedural provisions governing renegotiation for the later years—in which connection it made explicit its intention that Board orders are final unless the Tax Court's jurisdiction is invoked—but left untouched the administrative procedure for the earlier years, and hence apparently did not consider the advisability of including a finality provision for the Secretary's orders for the earlier years.

[53] The legislative history contains nothing indicating that the Tax Court remedy was not intended to apply equally to determinations covering all fiscal years. The House of Representatives and the Senate disagreed as to whether the Tax Court or the Court of Claims should be the forum for review (H. Rep. No. 871, 78th Cong., 1st Sess., pp. 76–77; S. Rep. No. 627, 78th Cong., 1st Sess., p. 34; H. Rep. No 1079, 78th Cong., 2d Sess., p. 84) but all agreed that whichever tribunal was selected should have "exclusive jurisdiction" (H. Rep. No. 871, p. 77; S. Rep. No. 627, p. 110; 90 Cong. Rec. 1355) and no distinction was made between earlier and later years. A proposal to permit recourse to the district courts was rejected; Congressman Izac, a member of the conference committee, commented as follows upon the provision for "court review": "We of the Naval Affairs Committee suggested that they have recourse to the district courts of the land, but disregarding our recommendations it was decided to put it first in the Claims Court, and finally in The Tax Court" (90 Cong. Rec. 1357). See also *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752, 768–77.

cases involving the later years (Section 403 (e) (2)), thus making applicable both the Tax Court's "exclusive jurisdiction * * * to finally determine the amount, if any, of such excessive profits" (Section 403 (e) (1)) and the freedom of its determinations from review or redetermination "by any court or other agency" (Section 403 (c) (1)). Indeed, the prime purpose of Congress to "bring about uniformity in the development and application of principles of decision" (89 Cong. Rec. 9929), by an expert tribunal (*Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752, 768–9) would be wholly frustrated by construing the Act to permit the earlier cases to by-pass the Tax Court in favor of the district courts or other courts of general jurisdiction.

The other bits of statutory language upon which petitioners rely are similarly unrewarding. The provision that an aggrieved contractor "may" file, rather than "shall" file a petition in the Tax Court, plainly does not make the Tax Court remedy an "option" or "privilege," which the contractor is free to accept or reject. The provision, which is applicable to determinations for all years, earlier and later (Section 403 (e) (1) (2)), was obviously used by Congress because it did not wish to require a contractor to seek review; "the alternative afforded by the use of the word 'may' is between seeking relief or submitting" to the Departmental determination (cf. *Lewis* v. *City of*

*Lockport,* 276 N. Y. 336, 344). Such is the unquestioned practice under Section 272 of the Internal Revenue Code which provides that a taxpayer "may" file a petition in the Tax Court for a redetermination of a tax deficiency ninety days after mailing of notice of a deficiency by the Commissioner.

Likewise, the provision that the Tax Court shall have exclusive jurisdiction "upon such filing," (likewise applicable to all years) does not mean that *until* the petition is filed the aggrieved party may resort to a forum other than the Tax Court. The provision is similar to or identical with that used in many statutes whose effect is to create exclusive jurisdiction in a designated forum. See, *e. g.,* Fair Labor Standards Act, 52 Stat. 1065, 29 U. S. C. 210; Securities and Exchange Act, 48 Stat. 901, 15 U. S. C. 78y (a); Holding Company Act, 49 Stat. 834, 15 U. S. C. 79x; Natural Gas Act, 52 Stat. 831, 15 U. S. C. 717r (b); Federal Power Act, 49 Stat. 860, 16 U. S. C. 825*l* (b); Food, Drug, and Cosmetic Act, 52 Stat. 1052, 21 U. S. C. 355 (h); Civil Aeronautics Act, 52 Stat. 1024, 49 U. S. C. 646 (d); Federal Alcohol Administration Act, 49 Stat. 978, 27 U. S. C. 204 (h). Under none of these statutes has an appealing party been permitted to choose another forum. See *American Sumatra Tobacco Corp.* v. *S. E. C.,* 93 F. 2d 236 (App. D. C.); *S. E. C.* v. *Andrews,* 88 F. 2d 441 (C. C. A. 2); *Okin* v. *S. E. C.,* 46

F. Supp. 481 (S. D. N. Y.), affirmed without opinion, 130 F. 2d 903 (C. C. A. 2), certiorari denied, 317 U. S. 701; *Miles Laboratories, Inc.* v. *F. T. C.*, 140 F. 2d 683 (App. D. C.), certiorari denied, 322 U. S. 752; cf. *Lockerty* v. *Phillips*, 319 U. S. 182; *Yakus* v. *United States*, 321 U. S. 414.

B. PETITIONERS' FAILURE TO PETITION THE TAX COURT BARS ALL CHALLENGE TO THE UNDER SECRETARY'S ORDERS ON ANY ISSUE WITHIN THE TAX COURT'S EXCLUSIVE ORIGINAL JURISDICTION

The necessary corollary of the Tax Court's status as the tribunal with exclusive original jurisdiction to redetermine the amount of excessive profits is that failure to invoke the Tax Court remedy bars a contractor from thereafter contesting the Departmental renegotiation order on any ground within the Tax Court's exclusive original jurisdiction. This follows from the general principles applicable to the exhaustion of administrative remedies, as well as from the structure and aims of the Renegotiation Act.

1. It is established doctrine that one who fails to exhaust his administrative remedy may not thereafter complain in the courts of alleged errors susceptible of administrative correction. (*Utley* v. *St. Petersburg*, 292 U. S. 106; *Milheim* v. *Moffat Tunnel Dist.*, 262 U. S. 710, 723–724; *First National Bank* v. *Weld County*, 264 U. S. 450, 454–456; *Meyers* v. *Bethlehem Corp.*, 303 U. S. 41, 50–51; *United States* v. *Ruzicka*, 329 U. S. 287, 290, 292, 294–295); cf. *Yakus* v. *United States*, 321 U. S. 414, 444–447. If, for example, a tax

is assessed in an amount said to be unreasonable and by procedures claimed to be arbitrary, and the taxpayer fails to take advantage of administrative procedures for redetermination, the original assessment becomes final and unchallengeable. In the *Utley* case, *supra*, the Court said (292 U. S. at 109):

> This court will not listen to an objection that the charge has been laid in an arbitrary manner when an administrative remedy for the correction of defects or inequalities has been given by the statute and ignored by the objector.

This canon is but part of the broader principle that where an exclusive remedy, administrative or judicial, is provided by statute, issues which could be, but have not been, raised in the designated tribunal cannot be urged in other judicial proceedings. *Yakus* v. *United States*, *supra*.[54] To allow a litigant to substitute the forum of his own choice for that selected by the legislature would subvert the legislative purpose and nullify the statutory scheme for adjudication.

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[54] Other cases illustrative of the rule are: *United States* v. *Piuma*, 40 F. Supp. 119, 122 (S. D. Cal.) affirmed, 126 F. 2d 601 (C. C. A. 9), certiorari denied, 317 U. S. 637; *Walling* v. *Cohen*, 48 F. Supp. 859 (E. D. Pa.) affirmed, 140 F. 2d 453 (C. C. A. 3); *United States* v. *Ridgeland Creamery Co.*, 47 F. Supp. 145, 149 (W. D. Wis.); *Harris* v. *Central Nebraska Public Power & Irr. Dist.*, 29 F. Supp. 425, 428 (D. Neb.); *Lehigh Valley R. Co.* v. *United States*, 188 Fed. 879 (C. C. A. 3); *United States* v. *Vacuum Oil Co.*, 158 Fed. 536 (W. D. N. Y.).

The cases which have established the principle show that it does not depend upon an explicit statutory statement that the initial administrative determination, if unreviewed, is to be final, nor upon the conclusiveness of the final step in the administrative process. The absence of an express provision (similar to that governing orders of the War Contracts Price Adjustment Board for years ending after June 30, 1943 (Section 403 (c) (1)) making the Secretary's orders for the earlier years final in the absence of timely petition to the Tax Court, is therefore inconclusive.[55] And it is also immaterial whether and to what extent "Congress intended to give the Tax Court the last word upon all questions of fact and law, or whether it could do so if that were surely its purpose" (*Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752, 771 (see *supra*, pp. 111–113. The controlling principle is that administrative orders should normally be attacked in the manner prescribed by statute, and an aggrieved party is not privileged to omit the proper appeals and to substitute a collateral challenge in other litigation.

[55] We point out above (*supra*, p. 119) that the omission was apparently inadvertent, and not intended to create a distinction between the earlier and later fiscal years. No. 74 (*Pownall*) is ruled by the Second Renegotiation Act, which contains this provision, and there is, therefore, no question that its failure to petition the Tax Court makes the Under Secretary's order final and conclusive, at least on issues of coverage and amount.

2. The structure and purpose of the Renegotiation Act gives ample reason for application of the general rule to the instant case. Cf. *United States* v. *Ruzicka*, 329 U. S. 287, 290–294. We have already reviewed the Congressional intention to centralize redetermination in the Tax Court in order to secure uniformity of decision, expertness of judgment, and a substantial degree of finality (*supra*, p. 116). And this Court has held in the most recent Renegotiation Act case that "it seems obvious, in view of the Act's terms, history, objects and the policies incorporated, that Congress clearly and at the very least intended the Tax Court's functions not only to be put in motion but to be fully performed, before judicial intervention should take place * * *" (*Aircraft*, 331 U. S. 752, 771). Congress did not intend "to allow skirting the [Tax Court] procedures devised altogether or partially * * *" (331 U. S. at 771). "To do this not only would contravene the will of Congress as a matter of restricting or deferring judicial action. It would nullify the congressional objects in providing the administrative determination." 331 U. S. at 767. The "entire structure" of the Act "indicates the congressional purpose to have matters of renegotiation promptly and expeditiously settled; and to accomplish this as far as possible both by informal negotiations and by introducing the compulsion of finality at

every stage unless each succeeding one is taken as commanded." 331 U. S. at 770.

The inescapable consequence is that where, as here, the contractor has chosen to skip the procedure Congress devised for him, he forfeits all right to judicial intervention or review on the issues he should have presented to the Tax Court, whatever his rights might have been had he followed the designated remedy. And this is so whether those issues be of "law" or of "fact." *Macauley* v. *Waterman SS Corp.*, 327 U. S. 540, 544; *Aircraft*, 331 U. S. at 776.

Moreover, in the absence of a completed Tax Court proceeding, a district court is powerless to adjudicate the correctness of the Under Secretary's orders. Disposition of the questions of coverage and amount raised by petitioners would require a determination of issues of fact as to which contracts were treated as renegotiable and as to the amount of excessive profits realized under contracts properly subject to renegotiation. There is, of course, no record of proceedings in the Tax Court which may be reviewed. Nor is there any Departmental record which can be reviewed, and the lack of such a record accords strictly with the Congressional intention. See *supra*, pp. 108–109. The district court, therefore, cannot grant relief by review of an administrative record but only by way of a trial *de novo*. But this the courts are plainly without power to

grant under the statutory scheme. *Supra*, pp. 116–120; cf. *Tagg Bros.* v. *United States*, 280 U. S. 420, 443–445; *Marshall* v. *Pletz*, 317 U. S. 383, 388.

3. If the Tax Court's redeterminations are wholly conclusive, and may not be reviewed elsewhere, there is even greater reason for holding that failure to petition the Tax Court locks the door finally. In our view, the Court need not reach the question here because petitioners are now barred, regardless of the conclusiveness of the Tax Court's redeterminations. See *supra*, pp. 112–113. However, we suggest that the finality provision of Section 403 (e) [56] relates at least to all non-constitutional issues of coverage and amount, and that in this respect the Act does not differ from many other provisions for administrative finality which have been accepted without question.[57] *Spaulding* v. *Douglas Aircraft Co.*, 154 F.

[56] "Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, *and such determination shall not be reviewed or redetermined by any court or agency*" [Italics supplied].

[57] See, as examples, *Crane* v. *Hahlo*, 258 U. S. 142, approving a New York statute which provided that an award by a board of assessors of damages from street construction "shall be final and conclusive upon all parties and persons whomsoever with respect to the amount of damage sustained"; *Hilton* v. *Merritt*, 110 U. S. 97, and *Passavant* v. *United States*, 148 U. S. 214, sustaining provisions making valuation determinations of customs officials final; and *United States*

2d 419, 427 (C. C. A. 9). As for the constitutionality of the Act on its face, the act does not expressly preclude such review (cf. *Lockerty* v. *Phillips*, 319 U. S. 182, 188–189), and the legislative history indicates that ultimate determination of such questions by this Court was expressly contemplated by an active sponsor of the Tax Court remedy (89 Cong. Rec. 9930). Cf. *Knowles* v. *Hirsch*, 65 F. Supp. 690, 691 (D. C. D. C.); *U. S. Electrical Motors* v. *Jones*, 153 F. 2d 134, 136 (App. D. C.).

4. Petitioners in Nos. 74 and 95 suggest, but hardly argue, that they should be wholly excused for having rejected Tax Court proceedings, because they would have been estopped to challenge the Act's constitutionality if they had elected to prosecute a statutory remedy made available to them by the Act itself (Br. in 95, p. 14; Supp. Br. in No. 74, p. 18). But the estoppel doctrine, most recently applied here in *Fahey* v. *Mallonee*, decided June 23, 1947, No. 687, last Term, would

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v. *Ju Toy*, 198 U. S. 253, and *Oceanic Navigation Co.* v. *Stranahan*, 214 U. S. 320, upholding the finality of executive action in connection with immigration matters. Compare *Williamsport Co.* v. *United States*, 277 U. S. 551, and *Heiner* v. *Diamond Alkali Co.*, 288 U. S. 502, denying any review of Board of Tax Appeals decisions on excess profit questions arising under the hardship sections of the Revenue Act of 1918. See also *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 303–304; *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 76–82 (Brandeis J., concurring).

obviously have no application to a contractor petitioning the Tax Court for a redetermination under the Act. He would be seeking no license, franchise or special benefit from that court, but a decision from a tribunal with "essentially judicial procedures and experience" (*Aircraft*, 331 U. S. at 769) that he had made no excessive war profits, within the meaning of the Act, in a particular fiscal year, and was accordingly free from the exaction which the Under Secretary's order imposed. Cf. *Oklahoma* v. *Civil Service Commission*, 330 U. S. 127, 139–140. Petitioners would be free to contest the Act's validity in the Tax Court, as others have done (*Stein Bros. Mfg. Co.* v. *Secretary of War*, 7 T. C. 863, 876–882; *Ring Constr. Corp.* v. *Secretary of War*, 8 T. C. 1070; cf. *Aircraft*, 331 U. S. at 772, fn. 35), and it is clear that "no constitutional right could have been prejudiced by so doing." *St. Louis & R. Co.* v. *Public Comm'n.*, 279 U. S. 560, 563; *Lawrence* v. *St. Louis-San Francisco Ry. Co.*, 274 U. S. 588, 592; *Routzahn* v. *Tyroler*, 36 F. 2d 208, 209 (C. C. A. 6), certiorari denied, 281 U. S. 734. In the *Aircraft* and *Wade* cases, this Court required contractors vigorously attacking the statute to complete their Tax Court proceedings, and the Court certainly did not intend to set a trap for these litigants. Similar rulings have issued in the case of other statutes. *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337,

345–346, 357; *Newport News Co.* v. *Schauffler*, 303 U. S. 54, 56; *Myers* v. *Bethlehem Corp.*, 303 U. S. 41, 50; *United States* v. *Ruzicka*, 329 U. S. 287, 294; cases cited *supra*; cf. *Electric Bond Co.* v. *Comm'n.*, 303 U. S. 419, 435.[88]

5. The issues of coverage and amount which petitioners are precluded from raising by their failure to petition the Tax Court are these: In No. 74 (*Pownall*), that petitioners' contracts for less than $100,000 were not subject to renegotiation under the Second Renegotiation Act; in No. 95 (*Alexander*), that petitioner's contracts for processing wool were not "subcontracts" subject to renegotiation under the original Act (see *supra*, pp. 104–107) and that excessive profits were not made; and in No. 105 (*Lichter*), that petitioners' subcontracts were statutorily exempt from renegotiation as subcontracts under prime contracts with a government department awarded as the result of competitive bidding for the construction of buildings and facilities. These questions are precisely of the type which the *Waterman* and *Aircraft* cases have held to be within the Tax

[88] The case of *Cappellini* v. *Commissioner*, 14 B. T. A. 1269, which is sometimes cited as applying estoppel to one who sought to attack the constitutionality of a taxing act (Section 280 of the Revenue Act of 1926) in the Board of Tax Appeals, was expressly disapproved in *Routzahn* v. *Tyroler*, 36 F. 2d 208, 209 (C. C. A. 6), certiorari denied, 281 U. S. 734. The revenue statute in question was upheld in *Phillips* v. *Commissioner*, 283 U. S. 589, without reference to any claim of estoppel.

Court's exclusive original jurisdiction. In each case, the lower courts properly held that petitioner could not attack the Under Secretary's order on these grounds. No. 74, R. 282; No. 95, R. 17, No. 105, R. 29–30, 44.

III. ASSUMING THAT QUESTIONS WITHIN THE EXCLUSIVE ORIGINAL JURISDICTION OF THE TAX COURT MAY BE DETERMINED IN THE PRESENT PROCEEDINGS, THE UNDER SECRETARY'S ORDERS WERE PROPER UNDER THE RENEGOTIATION ACT

A. SUBCONTRACTS FOR LESS THAN $100,000 ARE SUBJECT TO THE ACT

1. Section 403 (c) of the Act, as enacted on April 28, 1942, provided that "The Secretary of each Department is authorized and directed, whenever in his opinion excessive profits have been realized, or are likely to be realized, from any contract with such Department or from any subcontract thereunder" to require the contactor or subcontractor to renegotiate the contract prices; no limitation as to amount was established. Section 403 (c) further provided, again without reference to amount, that "This subsection shall be applicable to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, *whether or not such contracts or subcontracts contain a renegotiation or recapture clause,* provided that final payment pursuant to such contract or subcontract has not been made prior to the date of enactment of this Act" [Italics supplied].

Petitioner relies on Section 403 (b) which required that renegotiation clauses be inserted in contracts or subcontracts "hereafter made" in amounts in excess of $100,000. In terms, Section 403 (b) is merely a direction to the renegotiating agencies to insert renegotiation clauses in *future* contracts over $100,000 in amount, and does not purport to designate what contracts may be renegotiated. That is the function of Section 403 (c) which contains no reference to amounts, applies both to the future and the past, and which specifically authorizes renegotiation "whether or not" the contract or subcontract contains a renegotiation or recapture clause.[39]

2. The legislative history of the original Act indicates that the $100,000 limitation of Section 403 (b) was adopted simply to insure insertion of renegotiation clauses in large contracts without affecting either the right to insert such clauses in small contracts or to renegotiate smaller contracts. See Hearings before the Senate Appropriations Subcommittee on the Sixth Supplemental Defense Appropriation Bill for 1942 (77th

[39] Section 403 (e) also shows the Congressional intent that contracts for an amount less than $100,000 may be renegotiated. This subsection provided for the filing of certain financial data by any contractor "who holds contracts with respect to which the provisions of this section are applicable in an aggregate amount in excess of $100,000 * * *." This clause plainly contemplates the renegotiation of individual contracts under $100,000, since the test is "*aggregate* amount in excess of $100,000."

Cong., 2d Sess.), pp. 85–86. This has been the uniform administrative practice from the beginning. The "Principles, Policy and Procedure To Be Followed in Renegotiation," issued by the War Department on August 10, 1942 states (p. 9): "Subsection (c) of the statute does not impose a minimum dollar limitation on contracts or subcontracts under which the contract price may be refixed, corresponding to the $100,000 limitation of subsection (b), and therefore the contract price in any contract or subcontract may be so refixed irrespective of the amount of the contract or subcontract." See also Joint Statement by the War, Navy and Treasury Departments and the Maritime Commission, issued March 31, 1943, J–PAB–2 (e).

3. When the Act was amended on October 21, 1942 (effective as of April 28, 1942), Section 403 (c) continued to provide, as before, for the renegotiation of any contract or subcontract, and it was then specifically provided in Section 403 (c) (6) that renegotiation was applicable to all contracts, whether or not they contained a renegotiation clause, unless (among other things)

> (iii) the aggregate sales by the contractor or subcontractor * * * under contracts with the Departments and subcontracts thereunder do not exceed, or in the opinion of the Secretary concerned will not exceed, $100,000 for the fiscal year of such contractor or subcontractor.

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This amendment, which was enacted long before petitioners' subcontracts were renegotiated in 1944, expressly confirmed what was abundantly clear in the terms of the original Act and the prior practice of the renegotiating agencies.[60]

B. PETITIONERS' SUBCONTRACTS (IN NO. 105) ARE NOT EXEMPT FROM RENEGOTIATION MERELY BECAUSE THEY WERE SUBCONTRACTS UNDER PRIME CONSTRUCTION CONTRACTS, ALL AWARDED AFTER COMPETITIVE BIDDING

Section 403 (i) (1) of the Act, as added by the Revenue Act of 1943, set forth some six classes of agreements to which the provisions of the Renegotiation Act "shall not apply," some of which were carried forward from the Act as it previously stood and some of which were new. Included in these automatic exemptions were the following:

> (E) any contract with a Department, awarded as a result of competitive bidding,

[60] There is likewise no question that a war contractor's contracts may be renegotiated as a group rather than singly. The Revenue Act of 1942 (Act of October 21, 1942) amended the Renegotiation Act expressly to sanction the group renegotiation which the renegotiating agencies had found imperative (statutory pamphlet, pp. 8–9); Hearings before the Committee on Finance, U. S. Senate, 77th Cong., 2d Sess., on Sec. 403 of P. L. No. 528, pp. 2–3); Hearings before a Subcommittee of the Committee on Finance, U. S. Senate, 77th Cong., 2d Sess., on Sec. 403 of P. L. No. 528, pp. 16–17; H. Rept. No. 2586 (Conference Report), p. 80. The Second Renegotiation Act continued this authorization (statutory pamphlet, pp. 28–29), and from the beginning the consistent practice has been, in almost all cases, to renegotiate on the group basis.

for the construction of any building, structure, improvement, or facility; or

(F) any subcontract, directly or indirectly under a contract or subcontract to which this section [Section 403, *i. e.*, the Renegotiation Act] does not apply by reason of this paragraph. [Section 403 (i) (1).]

Section 403 (i) (1) (E), which was a new exemption, was made effective "only with respect to fiscal years ending after June 30, 1943" (Section 701 (d) of the Revenue Act of 1943), but Section 403 (i) (1) (F), relating to subcontracts under exempt primes, was made effective as of April 28, 1942, the date of the original Act.

Petitioners argue from this difference in effective dates that Congress desired subcontracts under construction contracts to be exempt from the beginning, but prime construction contracts to be exempt only from July 1, 1943. Petitioners concede that the prime contracts here involved were not exempt because entered into prior to July 1, 1943, but they nevertheless claim the benefit of a new exemption, added in their view by the Revenue Act of 1943, for their subcontracts entered into during 1942.

1. Petitioners' argument has no textual support. The prime contracts are admittedly not exempt under Section 403 (i) (1) even though construction contracts, because Section 403 (i) (1) (E) does not apply to 1942 contracts. It

must follow that petitioners' subcontracts are not exempted by Section 403 (i) (1) (F), the terms of which they do not fulfill; they are *not* under a contract or subcontract to which the Renegotiation Act is inapplicable by reason of Section 403 (i) (1). Section 403 (i) (1) (F), in paraphrase, exempts subcontracts whose prime contracts are exempt, and petitioners' prime contractors are concededly not free from renegotiation.

2. Nor is there any aid for petitioners in the Act's legislative history. It is clear that Section 403 (i) (1) (F) was made retroactive to April 28, 1942, in order to exempt subcontracts under all prime contracts which were automatically exempt, whether the primes were exempt before the Revenue Act of 1943 or after. As we have pointed out, *supra*, p. 134, Section 403 (i) (1) carried forward certain old exemptions of prime contracts which were effective as of April 28, 1942,[21] and Section 403 (i) (1) (F) had to be made retroactive to that date if all subcontracts under such exempt primes were to be themselves exempt. Congress intended that whenever a contract or an intermediate subcontract was exempt from the Act's provisions, a subcontract thereunder automatically became exempt, but there is no indication that Congress envisioned that a

[21] The Revenue Act of 1942 (Act of October 21, 1942) had incorporated certain exemptions, effective as of April 28, 1942. Revenue Act of 1942, Title VIII, Sec. 801 (c).

subcontract be statutorily exempt if the prime were covered.

As originally introduced and reported by the House Committee, the bill which became the Revenue Act of 1943 (H. R. 3687, 78th Cong., 1st Sess.) exempted "any subcontract, directly or indirectly under a contract or subcontract exempted from the provisions of this section, or to which this section does not apply, by reason of this paragraph" (Section 403 (i) (1) (E) of H. R. 3687). This exemption of subcontracts was twofold: First, subcontracts under contracts "*exempted*" by the War Contracts Price Adjustment Board under its discretionary authority (now Section 403 (i) (4) of the Act);[82] secondly, subcontracts under contracts or subcontracts "to which this section does not apply, by reason of this paragraph," *i. e.*, prime contracts or intermediate subcontracts automatically exempt under Section 403 (i) (1) of the Act (Section 403 (i) (1) (A), (B), (C), and (D) of H. R. 3687). The House Committee reported this provision favorably because "Under existing law, considerable confusion results from the fact that a subcontract may be subject to renegotiation even though the prime contract or any intermediate subcontract

[82] Petitioners claim no discretionary exemptions for their own subcontracts under Section 403 (i) (4), nor any exemption at all for their prime contractors. They claim only an automatic statutory exemption for their own subcontracts under Section 403 (i) (1) (F).

may not be so subject." H. Rept. No. 871, 78th Cong., 1st Sess., p. 79.

The Senate Committee deleted the language "exempted from the provisions of this section," and thus limited the exemption for subcontracts to those under prime contracts or intermediate subcontracts which were automatically exempt by reason of Section 403 (i) (1). And the Senate Committee Report explicitly so states (S. Rept. No. 627, 78th Cong., 1st Sess., pp. 100–101). Apparently at the suggestion of Joseph M. Dodge, Chairman of the then Joint Price Adjustment Board, that the exemption "of subcontracts under exempt prime contracts" be made effective as of April 28, 1942 (Hearings before the Committee on Finance, U. S. Senate, 78th Cong., 1st Sess., on H. R. 3687, p. 1075), the Senate Committee made its exemption retroactive. The reason for this provision, as we have stated (*supra*, p. 136), was clearly to insure that subcontracts attributable to fiscal years ending before June 30, 1943, under exempt primes falling in these earlier fiscal years (*i. e.*, exempt from the beginning) be likewise exempt.

The conference accepted the restrictive Senate view that the only subcontracts which should automatically be exempt were those under automatically exempt primes; and likewise adopted the Senate amendment as to the effective date of Section 403 (i) (1) (F). (Conference Report:

H. Rept. No. 1079, 78th Cong., 2d Sess., pp. 36, 85).[83] Nothing was said in either House to bear out petitioners' curious misconstruction of the exemption provisions.

3. Section 403 (i) (2) of the Act, also as amended by the Revenue Act of 1943, authorizes the War Contracts Price Adjustment Board "by regulation to interpret and apply the exemptions provided for in paragraph (1) (A), (B), (C), (E), and (F) * * *." The Board's Regulations proceed on the interpretation of Section 403 (i) (1) (F) which we have stated, and provide that "a determination made with respect to the exempt or non-exempt status of the prime contract should be controlling with respect to the exempt or non-exempt status of the subcontract." Renegotiation Regulations, adopted by the War Contracts Price Adjustment Board, March 24, 1944, Sec. 347.2, 10 Fed. Reg. 986, Sec. 1603.347–2. Thus, the renegotiating agencies' administrative practice and regulations on exemptions, specifically authorized by the Act, refute petitioners'

[83] The Statement of the Managers on the Part of the House calls attention to the fact that the House bill exempted subcontracts under both automatically exempt and discretionarily exempted primes, and that the conference agreement "limits the exemption of such subcontracts * * * to those which are directly or indirectly under contracts or subcontracts to which the Renegotiation Act does not apply by reason of subsection (i) (1)" (*i. e.*, the statutory exemption provision). (H. Rept. No. 1079, p. 85.) No reference is made to the change in effective date of the provision.

claim. Even if the language and history of the Act left doubt, this authorized administrative practice would alone be conclusive.

C. PETITIONER'S AGREEMENTS (IN NO. 95) WERE ALL SUBCONTRACTS WITHIN THE MEANING OF THE ORIGINAL ACT

In No. 95 (*Alexander*), petitioner contends that its agreements to comb grease wool on a commission basis were not "subcontracts," with the original Act, apparently because the prime contracts in the performance of which the wool combed by petitioner was used were not always known to petitioner and sometimes not even in existence when its services were performed. See *supra*, pp. 16–18, 104–107. Petitioner apparently does not contest, as it cannot, that the term "subcontract," as used in the original Act, includes not only agreements to furnish all or a part of the articles called for by the prime contract, but also those for the furnishing or processing of any material incorporated in such end product articles. Cf. *Commissioner of Internal Revenue* v. *Aluminum Co. of America*, 142 F. 2d 663 (C. C. A. 3), certiorari denied, 323 U. S. 728 ("subcontract" in the Vinson Act).

1. The term "subcontract" "has no single exact meaning"; the meaning which Congress attaches to the word in a particular statute must be ascertained from the purpose, context, and history of the legislation. *MacEvoy Co.* v. *United States*, 322 U. S. 102, 108–109. The broad purpose of

the Renegotiation Act was to strike at the evil of excessive profits arising out of federal war expenditures. As the "Truman Committee" observed in its report of March 4, 1944 (S. Rep. No. 10, Part 16, 78th Cong., 2d Sess., p. 60), "the purpose of this law is to prevent excessive prices and inordinate profits in any article or service which contributes to the cost of war" and the "accomplishment of those objectives is more important than adherence to classic definitions" of a "subcontract". To effectuate the purpose of the Act, all contracts directly contributing to the cost of the war and ultimately paid for with public funds would have to be subject to renegotiation."

The construction urged by petitioner would largely defeat this purpose. The exclusion of purchases for inventory made prior to the execution of prime contracts would eliminate from renegotiation a large share of business directly contributing to the cost of the war. For it is common practice to purchase materials for stock pile in advance of orders, and the urgency of war requirements gave just impetus to this practice

" Contracts which contribute only "indirectly" to the production of the end product have been excluded in the actual administration of the Act, even after the legislative definition of "subcontract" on October 21, 1942. Contracts in this category include agreements to furnish and to provide fuel and equipment to produce light, heat, and power. Joint Renegotiation Manual, approved January 27, 1944, paragraph 333.4.

during the war (affidavit of Col. Maurice Hirsch, then Chairman of the War Contracts Price Adjustment Board, pars. 6, 8, 10, R. 104–107). Petitioner's interpretation, moreover, would arbitrarily discriminate between subcontractors, otherwise identically placed, who differed only in the time of signing of their subcontracts as related to the making of the prime contract. (Hirsch affidavit, par. 9, R. 106.) The suggested construction would also have been unworkable in practice. It would have necessitated the keeping of detailed records by all contractors in order to trace the origin of all parts or materials ultimately incorporated in the end product. Such a task "would have imposed upon American industry so great a burden of keeping records that war production would thereby undoubtedly have been very substantially impeded" (Hirsch affidavit, par. 11, R. 107, and examples at R. 107–111).[65]

[65] There is some suggestion that the term "subcontract," as used in the Vinson Act (48 Stat. 503, 49 Stat. 1926), includes agreements to furnish services only if such services are "intended and designated for use in identified" prime contracts. See *Commissioner of Internal Revenue v. Aluminum Company of America*, 142 F. 2d 663, at 668 (C. C. A. 3), certiorari denied, 323 U. S. 728. If this be taken to mean that Vinson Act subcontracts must follow, rather than precede, their primes, there is ground for the ruling in the differences between the Vinson and Renegotiation Acts. The Vinson Act was a peacetime act designed to reach only those subcontracts for standard articles or services as were intended for the limited field of ships and aircraft, and the problems of record-keeping and administration would be slight. More-

2. The Act of October 21, 1942, retrospectively defined the term "subcontract" so that there was no doubt that petitioner's agreements are covered by the Act. See *supra*, p. 105. Each of its contractual arrangements for the processing of wool clearly constitutes an "order or agreement to perform * * * part of the work * * * required for the performance" of the prime contract. The statute has been consistently interpreted, by those charged with its execution, to cover agreements such as petitioner's (Hirsch affidavit, pars. 5, 6, 17, R. 103–104, 111–112), and this contemporaneous administrative construction bears great weight. See *Great Northern Ry. Co. v. United States*, 315 U. S. 262, 275.

The inclusion of an explicit definition of the term "subcontract" in the Act of October 21, 1942 was largely prompted by the erroneous decision, subsequent to April 28, 1942, of the Board of Tax Appeals in the *Aluminum Company* case, 47 B. T. A. 543, holding that materialmen were not subcontractors under the Vinson Act, and overturning contrary rulings of the Treasury,

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over, in order not to discourage production for non-munitions purposes, a peacetime statute limiting munitions profits may well be interpreted to require definite knowledge on the part of the subcontractor that his products will form part of a vessel or aircraft. This is especially true in the case of the Vinson Act, one major aim of which was the subjective one of deterring munitions-makers from promoting war for profit reasons.

Navy and Maritime Commission.[46] There is nothing in the legislative history of the Act of October 21, 1942 to indicate that Congress, in defining "subcontract," was affirmatively changing the original Act. On the contrary, the term was being clarified at the request of the Departments, which were uncertain of its full extent. See Hearings before a Subcommittee of the Committee on Finance, Senate, 77th Cong., 2d Sess. on Sec. 403 of P. L. No. 528, pp. 15–16, 22–23; Hearings before the Committee on Finance, Senate, 77th Cong., 2d Sess. of Sec. 403 of P. L. No. 528, pp. 37–38, 40. In adopting the definition, Congress indicated its understanding of "subcontract."

3. Petitioner's contention that it could not ascertain with any certainty the end use of all the wool processed by it is entitled to little weight. Petitioner has certified that all its production of wool top was "for United States Army and United States Navy fabric" (R. 30). See *supra*, p. 17. The following statement of the House Naval Affairs Committee in its report of October 7, 1943, is pertinent (H. Rep. No. 733, 78th Cong., 1st Sess., pp. 15–16):

> It has been said that where a manufacturer produces bearings or some kindred article and sells them to other manufactur-

[46] The case was subsequently reversed by the Circuit Court of Appeals for the Third Circuit, 142 F. 2d 663 (decided April 28, 1944), and certiorari was denied by this Court, 323 U. S. 728.

ers who in turn may or may not sell their end product to the Government, he has no way of knowing that the end use of the bearing which he produced will be in connection with the war. He does not say that, however, when he seeks priorities for the production of his products. Then he is quite clear as to the war end use of his products. We think that generally the priorities which a manufacturer obtains and other indices available to him, can assist him materially in segregating his war production from his civilian production.

### CONCLUSION

For the foregoing reasons, we respectfully submit that the judgments below are correct and should be affirmed.

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NOVEMBER 1947.

# APPENDIX

The Act of June 30, 1945, 59 Stat. 294 (the last amendment to the Renegotiation Act) provides as follows:

AN ACT To extend through December 31, 1945, the termination date under the Renegotiation Act.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That subsection (h) of the Renegotiation Act (relating to the termination date) is amended to read as follows:

"(h) This section shall apply only with respect to profits derived from contracts with the Departments and subcontracts which are determined under regulations prescribed by the Board to be reasonably allocable to performance prior to the close of the termination date. Notwithstanding the method of accounting employed by the contractor in keeping his books, profits determined to be so allocable shall be considered as having been received or accrued not later than the termination date. For the purposes of this subsection, the term 'termination date' means whichever of the following dates first occurs—

"(1) December 31, 1945; or

"(2) the date proclaimed by the President as the date of the termination of hostilities in the present war; or

"(3) the date specified in a concurrent resolution of the two Houses of Congress as the date of the termination of hostilities in the present war."

SEC. 2. TERMINATION OF REPRICING OF WAR CONTRACTS.

Section 802 (b) of the Revenue Act of 1943 (relating to repricing of war contracts) is amended to read as follows:

"(b) Section 801 shall not apply to any contract with a Department or any subcontract made after (1) the date proclaimed by the President as the date of the termination of hostilities in the present war, or (2) the date specified in a concurrent resolution of the two Houses of Congress as the date of such termination, or (3) December 31, 1945, whichever date is the earlier."

Approved June 30, 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1947

# SUPREME COURT OF THE UNITED STATES

Nos. 105, 74 AND 95.—OCTOBER TERM, 1947.

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| Jacob Lichter and Jennie L. Lichter, Individually and as Co-Partners Doing Business as Southern Fireproofing Company, a Co-Partnership, Petitioners,<br>105 *v.*<br>The United States of America. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit. |
| A. V. Pownall, Grace M. Pownall and Henes-Morgan Machinery Company, Ltd., a Corporation, Co-Partners Doing Business as General Products Company, Petitioners,<br>74 *v.*<br>The United States of America. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit. |
| Alexander Wool Combing Company, Petitioner,<br>95 *v.*<br>The United States of America. | On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit. |

[June 14, 1948.]

MR. JUSTICE BURTON delivered the opinion of the Court.

The Renegotiation Act,[1] in time of crisis, presented to this nation a new legislative solution of a major phase of the problem of national defense against world-wide

[1] The Renegotiation Act, including its amendments, is here treated as consisting of:

I. Section 403, Sixth Supplemental National Defense Appropriation Act, 1942, approved April 28, 1942, c. 247, 56 Stat. 226, 245–246. Sometimes this is called the Original or First Renegotiation Act. For relevant excerpts from its text see Appendix I, *infra*.

II. Title VIII, Renegotiation of War Contracts, Revenue Act of 1942, approved October 21, 1942, c. 619, 56 Stat. 798, 982–985, 26

aggression. Through its contribution to our production program it sought to enable us to take the leading part in winning World War II on an unprecedented scale of total global warfare without abandoning our traditional faith in and reliance upon private enterprise and individual initiative devoted to the public welfare.

In each of the three cases before us the principal issue is the constitutionality, on its face, of the Renegotiation Act insofar as it is authority for the recovery of the excessive profits sought to be recovered by the United States from the respective petitioners. In each case the secondary issue is whether the failure of the respective petitioners to petition the Tax Court for a redetermination of the amount, if any, of their excessive profits excludes from

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U. S. C. A. *Internal Revenue Acts Beginning 1940*, Revenue Act of 1942, § 801, p. 376. For relevant excerpts from its text see Appendix II, *infra*.

III. Section 1, Military Appropriation Act, 1944, approved July 1, 1943, c. 185, 57 Stat. 347–348.

IV. An Act to prevent the payment of excessive fees or compensation in connection with the negotiation of war contracts, approved July 14, 1943, c. 239, 57 Stat. 564–565.

V. Title VII, Renegotiation of War Contracts, and Title VIII, Repricing of War Contracts, Revenue Act of 1943, passed notwithstanding the objections of the President, February 25, 1944, c. 63, 58 Stat. 21, 78–93, 50 U. S. C. (Supp. V, 1946) §§ 1191, 1192; also 26 U. S. C. A. *Internal Revenue Acts Beginning 1940*, Revenue Act of 1943, §§ 701 and 801, pp. 491 and 508. For relevant excerpts from its text see Appendix III, *infra*. Sometimes this is called the Second Renegotiation Act. Section 701 (b), of the foregoing Chapter 63, added to § 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, a final subsection as follows: "(l) This section may be cited as the 'Renegotiation Act.'" 58 Stat. 90. Section 701 (d) also provided that this subsection (l) of § 403, and certain others, "shall be effective as if such amendments and subsections had been a part of section 403 of such Act on the date of its enactment." 58 Stat. 92.

VI. An Act to extend through December 31, 1945, the termination date under the Renegotiation Act, approved June 30, 1945, c. 210, 59 Stat. 294–295, 50 U. S. C. (Supp. V, 1946) § 1191.

consideration here the coverage of the Act, the amount of the profits and other comparable issues which could have been presented to the Tax Court. In each of these cases the District Court has held that the Act was constitutional and that, by failure to petition the Tax Court for their redetermination, the existing orders have become final as claimed by the Government. Each Circuit Court of Appeals has affirmed, unanimously, the judgment appealed to it. We agree with the courts below.

In each of these cases the United States obtained a judgment for a sum alleged to be owed to it pursuant to a determination of excessive profits under the Renegotiation Act. The determinations of excessive profits in the respective cases were made by the Under Secretary of War or by the War Contracts Price Adjustment Board after the Revenue Act of 1943 had been approved, February 25, 1944. That Act contained, in its Title VII, the so-called Second Renegotiation Act which included provisions for the filing with the Tax Court of petitions for the redeterminations of excess profits. None of these petitioners, however, filed such a petition with the Tax Court. On the other hand, the respective petitioners have relied upon their claims that, as a matter of law, the Renegotiation Act is unconstitutional on its face insofar as it purports to authorize the judgments which have been taken against the respective petitioners. The petitioners contend also that their failures to file petitions with the Tax Court have not foreclosed their respective rights to contest here the coverage of the Act, the amount of the excess profits found against them and other comparable issues which they might have presented to the Tax Court.

NO. 105 (THE LICHTER CASE).

In May, 1945, the United States filed its complaint in the District Court of the United States for the Southern District of Ohio against the petitioners, Jacob Lichter

and Jennie L. Lichter, engaged in the construction business in Cincinnati, Ohio, under the name of the Southern Fireproofing Company, a copartnership. The complaint was founded upon the determination by the Under Secretary of War, dated October 20, 1944, that $70,000 of the profits realized by petitioners during the calendar year 1942 from nine subcontracts, executed in 1942 for a total price of $710,224.16, were, under the Renegotiation Act, excessive profits. The complaint showed that the petitioners were entitled to a tax credit of $42,980.61 against such excessive profits. It alleged, moreover, that the petitioners had not, within the required period, petitioned the Tax Court for a redetermination of the order in question and had not paid or otherwise eliminated the amount of $27,019.39 thus due to the United States.

The petitioners admitted that the Under Secretary had made the determination as alleged; that if his order were valid the petitioners were entitled to the tax credit specified; and that they had not paid the sum demanded nor had they filed a petition with the Tax Court for a redetermination of the excessive profits, if any. They put in issue, on specifically stated grounds, the constitutionality of the Renegotiation Act insofar as it might be authority for the recovery of the profits sought to be recovered, and they put in issue the applicability to them of any requirement that they seek in the Tax Court a redetermination of the profits which they had been ordered to repay to the United States. They alleged also that: of the nine subcontracts which were made the basis of renegotiation, all were executed during the calendar year 1942; four were executed before April 28, 1942, the date of the original Renegotiation Act; none contained clauses permitting or requiring their renegotiation; only two of them were for amounts in excess of $100,000 each; these two were among those which had been executed before April 28, 1942; and no excessive profits had been in fact earned by the peti-

tioners during 1942. Finally they alleged that the several contracts referred to were subcontracts entered into under prime contracts which had been awarded by a department of the Government as the result of competitive bidding for the construction of buildings and facilities and the subcontracts themselves had been obtained by petitioners after further competitive bidding. For these and other reasons stated in the answer the contracts were claimed to be exempt from renegotiation.

The United States moved for judgment on the pleadings and, in the alternative, for summary judgment. Affidavits were filed in support of those motions. These included particularly the comprehensive affidavits of Robert P. Patterson, then Under Secretary of War, and of H. Struve Hensel, then Assistant Secretary of the Navy. These affidavits set forth the general background of the Renegotiation Act and the basis for claiming that the renegotiation of war contracts was necessary in order to sustain this nation's share of the burden of winning World War II. Counterparts of these two affidavits were filed in each of the other cases before us. The petitioners, on the other hand, moved to dismiss the complaint on the grounds that it failed to state a claim upon which relief could be granted and that the profits in question were exempt from the Act.

The District Court made findings of fact substantially as stated in the complaint and admitted in the answer. It concluded that there was no genuine issue as to any material fact and that the United States was entitled to judgment as a matter of law for $27,019.39, with interest at six percent per annum from November 6, 1944. 68 F. Supp. 19. The Circuit Court of Appeals for the Sixth Circuit affirmed the judgment. It held expressly that the Renegotiation Act was valid on its face and that the petitioners, by reason of their failure to petition the Tax Court for a redetermination of the amount of the

excessive profits, if any, were barred from making their other attacks on the Secretary's determination of such excessive profits. 160 F. 2d 329. Because of the basic significance of the constitutional questions involved we granted certiorari. 331 U. S. 802.

NO. 74 (THE POWNALL CASE).

In September, 1945, the United States filed its complaint in the District Court of the United States for the Southern District of California against the petitioners, A. V. Pownall, Grace M. Pownall, and Henes-Morgan Machinery Company, Limited, a California corporation, all three doing business in Los Angeles, California, as copartners under the name of General Products Company. The record indicates that they were there engaged in the production of precision parts, machinery and tools for use by war contractors. The complaint was founded upon a determination made by the Under Secretary of War, on behalf of the War Contracts Price Adjustment Board, dated December 27, 1944, to the effect that $628,373.14 of the profits realized by petitioners during the calendar year 1943 on their contracts and subcontracts, subject to renegotiation pursuant to the Renegotiation Act, were excessive profits. The complaint showed that the petitioners were entitled to a tax credit of $514,663.95 against such profits. It alleged, moreover, that the petitioners had not, within the required period, petitioned the Tax Court for a redetermination of the order in question and had not paid the sum of $113,709.19 thus claimed by the United States. The petitioners admitted that the Under Secretary had made the determination as alleged; that the Board had adopted his order; that the appropriate tax credit was as alleged; that no petition for redetermination had been filed with the Tax Court; that the time for filing had expired; and that no payment of the amount claimed had been made. The petitioners alleged, however, that the Renegotiation Act was invalid on its face

on numerous specifically stated constitutional grounds; that the Under Secretary's order was invalid in that it was based on undisclosed data and contained no findings; and that no single contract under consideration exceeded in amount the sum of $99,000.

The United States moved for judgment on the pleadings and, in the alternative, for summary judgment. The petitioners did the same. Under the stipulations of the parties there were no disputed issues of fact and the only questions left for decision were those as to the constitutional validity of the Act and as to its interpretation if found to be valid.

The District Court denied the motions of both parties. However, ruling on the merits of the cause thus before it, it found the facts to be substantially as alleged in the complaint and as stipulated. It held the Act to be valid on its face and held the unappealed determination of excessive profits to be final. It rendered judgment for the United States for $121,043.39, evidently representing $113,709.19, with interest at six percent per annum from March 13, 1945. 65 F. Supp. 147, and see findings of fact, conclusions of law and judgment of the court. The Circuit Court of Appeals for the Ninth Circuit affirmed the judgment. It followed its earlier decision in *Spaulding* v. *Douglas Aircraft Co.*, 154 F. 2d 419, in upholding the constitutionality of the Act and expressly holding that the petitioners, by not having petitioned the Tax Court for relief, had failed to exhaust their administrative remedies. Accordingly, it held that the District Court was without jurisdiction to consider the petitioners' contentions as to the coverage of the Act. 159 F. 2d 73. We granted certiorari. 331 U. S. 802.

NO. 95 (THE ALEXANDER CASE).

In August, 1945, the United States filed its complaint in the District Court of the United States for the District of Massachusetts against the petitioner, Alexander Wool

Combing Company, a Massachusetts corporation doing business at Lowell, Massachusetts, and there engaged in the business of scouring wool and combing it into tops and noils for commissions paid to it by the owners of the wool. The complaint was founded upon two determinations by the Under Secretary of War, both dated September 6, 1944. One determined that $22,500 of the profits realized by the petitioner during its fiscal year ended June 30, 1942, and the other that $45,000 of the profits realized by the petitioner during its fiscal year ended June 30, 1943, under its contracts and subcontracts alleged to be subject to the provisions of the Renegotiation Act, were excessive. The complaint showed that the petitioner was entitled to a tax credit of $15,020.80 against such excessive profits for the fiscal year ended June 30, 1942, and of $36,596.42 against those for the fiscal year ended June 30, 1943. The complaint alleged, moreover, that the petitioner had not, within the required periods, petitioned the Tax Court for a redetermination of either of the orders in question; that the respective periods for filing such petitions had expired; and that the petitioner had not paid, or otherwise eliminated, the amount of $15,882.78 thus due to the United States. The petitioner admitted the factual allegations of the complaint but denied that any amount was owing to the United States. It claimed that the determinations made by the Under Secretary were void because made without due process of law and were unenforcible as to the petitioner because, as applied to it, they were unconstitutional for several specifically stated reasons.

The United States moved for judgment on the pleadings or, in the alternative, for summary judgment. In support of these motions the above-mentioned affidavits of Robert P. Patterson, Under Secretary of War, and of H. Struve Hensel, Assistant Secretary of the Navy, and several others were filed. Evidence both oral and in affi-

davit form was submitted in opposition. The District Court stated in its opinion, 66 F. Supp. 389, 391, that the petitioner "had no direct contracts with any department or agency of the United States. It combed wool for different private companies. It knew that some of the wool it combed for the companies was destined for use in government contracts, but it was and is ignorant as to the destination of other wool." That court, nevertheless, rendered judgment in favor of the United States, for $15,882.78, with interest at six percent per annum from September 6, 1944. It held that the war powers of Congress were sufficient to enable it to authorize the recapture of excessive profits such as these; that the standard of "excessive profits" was sufficient to satisfy the constitutional limitations on the power of Congress to delegate authority; that any defects in the departmental proceedings were immaterial in view of the opportunity afforded the petitioner for a trial *de novo* and for a redetermination of excessive profits, if any, in the Tax Court; and that petitioner's defenses on the ground of lack of coverage or of retroactivity of the application of the Renegotiation Act to the petitioner were lost to it by its failure to seek relief from the Tax Court. The Circuit Court of Appeals for the First Circuit said, *per curiam*: "We think the court below adequately covered all the issues in this case and we affirm its judgment upon the grounds and for the reasons set forth in its opinion . . . ." 160 F. 2d 103.[2] We granted certiorari. 331 U. S. 802.

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[2] In addition to the opinions of the Circuit Courts of Appeals and District Courts cited in the text, see *Ring Construction Corp.* v. *Secretary of War*, 8 T. C. 1070; *Cohen* v. *Secretary of War*, 7 T. C. 1002; *Stein Bros. Mfg. Co.* v. *Secretary of War*, 7 T. C. 863. For discussions of the Renegotiation Act by this Court, stopping short of passing upon its constitutionality, see *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752; and *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540.

THE BACKGROUND.

We have two main issues before us: (1) the constitutionality of the Renegotiation Act on its face and (2) the finality of the determination of the excessive profits made under it in the absence of a petition filed with the Tax Court within the required time, seeking a redetermination of those profits. In the *Lichter* case we have issues as to profits made in the calendar year 1942, in the *Pownall* case as to profits made in the calendar year 1943, and in the *Alexander* case as to certain profits made in the fiscal year ended June 30, 1942, and as to other profits made in the fiscal year ended June 30, 1943. In each case we uphold the constitutionality of the Act as providing the necessary authorization for the judgments rendered. We also accept the finality given by the courts below to the administrative determinations made of the excessive profits, although the statutory situation as a basis for the finality of such determinations is not precisely the same in each case. By reason of the finality thus attached to the determinations made as to excessive profits in these cases, we do not pass upon the issues attempted to be raised here as to the coverage of the Act, the amount of the profits, or other matters which the petitioners might have presented to the Tax Court but did not.

In procedure which affects property rights as directly and substantially as that authorized by the Renegotiation Act, the governmental action authorized, although resting on valid constitutional grounds, is capable of gross abuse. The very finality of the administrative determinations here upheld emphasizes the seriousness of the injustices which can result from the abuse of the large powers vested in the administrative officials. We do not minimize the seriousness of complaints which thus may be cut off without relief in the name of the necessities of war and

for the sake of the defense of the nation when its survival is at stake. We re-emphasize that, under these conditions, there is great need both for adequate channels of procedural due process and for careful conformity to those channels. In total war it is necessary that a civilian make sacrifices of his property and profits with at least the same fortitude as that with which a drafted soldier makes his traditional sacrifices of comfort, security and life itself. Within procedure thus authorized by the Constitution, the Congress and the Administration, and here affirmed, resulting injustices can and should be carefully examined and as far as possible relieved. In war both the raising and the support of the armed forces are essential. Both require mobilization and control under the authority of Congress. Both are entitled also to such postwar relief as may be authorized by Congress.

The Renegotiation Act was developed as a major wartime policy of Congress comparable to that of the Selective Service Act. The authority of Congress to authorize each of them sprang from its war powers. Each was a part of a national policy adopted in time of crisis in the conduct of total global warfare by a nation dedicated to the preservation, practice and development of the maximum measure of individual freedom consistent with the unity of effort essential to success.

With the advent of such warfare, mobilized property in the form of equipment and supplies became as essential as mobilized manpower. Mobilization of effort extended not only to the uniformed armed services but to the entire population. Both Acts were a form of mobilization. The language of the Constitution authorizing such measures is broad rather than restrictive. It says "The Congress shall have Power . . . To raise and support Armies, but no appropriation of Money to that Use shall be for a longer Term than two Years; . . . ." Art. I, § 8, Cl.

12.[3] This places emphasis upon the supporting as well as upon the raising of armies. The power of Congress as to both is inescapably express, not merely implied. The conscription of manpower is a more vital interference with the life, liberty and property of the individual than

[3] Among the many other provisions implementing the Congress and the President with powers to meet the varied demands of war, the following obviously command attention: "We the People of the United States, in Order to form a more perfect Union, . . . provide for the common defence, . . . and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America." U. S. Const. Preamble.

"The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; . . .

"To declare War, . . .

"To provide and maintain a Navy;

"To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, . . . ." *Id.* Art. I, § 8.

"The President shall be Commander in Chief of the Army and Navy of the United States, . . . ." *Id.* Art. II, § 2, Cl. 1.

Madison said in The Federalist, Number XLI,—General View of the Powers Conferred by the Constitution: "Security against foreign danger is one of the primitive objects of civil society. It is an avowed and essential object of the American Union. The powers requisite for attaining it must be effectually confided to the federal councils."

Hamilton said in The Federalist, Number XXIII,—The Necessity of a Government as Energetic as the One Proposed to the Preservation of the Union:

"The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be co-extensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defence."

is the conscription of his property or his profits or any substitute for such conscription of them. For his hazardous, full-time service in the armed forces a soldier is paid whatever the Government deems to be a fair but modest compensation. Comparatively speaking, the manufacturer of war goods undergoes no such hazard to his personal safety as does a front-line soldier and yet the Renegotiation Act gives him far better assurance of a reasonable return for his wartime services than the Selective Service Act and all its related legislation give to the men in the armed forces. The constitutionality of the conscription of manpower for military service is beyond question. The constitutional power of Congress to support the armed forces with equipment and supplies is no less clear and sweeping.[4] It is valid, *a fortiori*.

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[4] "The Constitution grants to Congress power 'to raise and support Armies,' 'to provide and maintain a Navy,' and to make all laws necessary and proper to carry these powers into execution. Under this authority Congress can draft men for battle service. *Selective Draft Law Cases*, 245 U. S. 366. Its power to draft business organizations to support the fighting men who risk their lives can be no less." *United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289, 305.

In writing of the power of Congress to pass a Conscription Act, President Lincoln said, with characteristic clearness:

"Whether a power can be implied when it is not expressed has often been the subject of controversy; but this is the first case in which the degree of effrontery has been ventured upon of denying a power which is plainly and distinctly written down in the Constitution. The Constitution declares that 'The Congress shall have power . . . to raise and support armies; but no appropriation of money to that use shall be for a longer term than two years.' The whole scope of the conscription act is 'to raise and support armies.' There is nothing else in it. . . .

". . . Do you admit that the power is given to raise and support armies, and yet insist that by this act Congress has not exercised the power in a constitutional mode?—has not done the thing in the right way? Who is to judge of this? The Constitution gives Congress the power, but it does not prescribe the mode, or expressly

In view of this power "To raise and support Armies, . . ." and the power granted in the same Article of the Constitution "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, . . ." the only question remaining is whether the Renegotiation Act was a law "necessary and proper for carrying into Execution" the war powers of Congress and especially its power to support armies.

It is impossible here to picture adequately all that might have been "necessary and proper" in 1942–1944 to meet the unprecedented responsibility facing Congress in this field. We do, however, catch a glimpse of it in authoritative, contemporaneous descriptions of the situation. Accordingly, we have set forth in the margin ex-

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declare who shall prescribe it. In such case Congress must prescribe the mode, or relinquish the power. There is no alternative. . . . The power is given fully, completely, unconditionally. It is not a power to raise armies if State authorities consent; nor if the men to compose the armies are entirely willing; but it is a power to raise and support armies given to Congress by the Constitution, without an 'if.'" 9 Nicolay and Hay, Works of Abraham Lincoln 75–77 (1894).

The foregoing quotation is from an opinion by President Lincoln, which was not actually issued or published by him but which was quoted to the above extent by Honorable Charles Evans Hughes, of New York, in his address on "War Powers Under the Constitution" before the American Bar Association, September 5, 1917, 42 A. B. A. Rep. 232, 234–235.

The draft was put in force both by the Union and by the Confederacy during the Civil War and its validity was sustained by the courts in both North and South. "The power of coercing the citizen to render military service, is indeed a transcendent power, in the hands of any government; but so far from being inconsistent with liberty, it is essential to its preservation." *Burroughs v. Peyton*, 16 Gratt. 470, 473. See cases cited in 42 A. B. A. Rep. 234 n. 1, and see *Selective Draft Law Cases*, 245 U. S. 366; *Jacobson v. Massachusetts*, 197 U. S. 11, 29; *In re Grimley*, 137 U. S. 147, 153.

cerpts from the message of the President to the Congress upon the State of the Union, January 6, 1942,[5] from a

[5] "Our own objectives are clear: The objective of smashing the militarism imposed by war lords upon their enslaved peoples; the objective of liberating the subjugated nations; the objective of establishing and securing freedom of speech, freedom of religion, freedom from want, and freedom from fear everywhere in the world.

"We shall not stop short of these objectives; nor shall we be satisfied merely to gain them and call it a day. I know that I speak for the American people—and I have good reason to believe I speak also for all the other peoples who fight with us—when I say that this time we are determined not only to win the war, but also to maintain the security of the peace which will follow.

"But modern methods of warfare make it a task, not only of shooting and fighting, but an even more urgent one of working and producing.

"Victory requires the actual weapons of war and the means of transporting them to a dozen points of combat.

"It will not be sufficient for us and the other united nations to produce a slightly superior supply of munitions to that of Germany, Japan, Italy, and the stolen industries in the countries which they have overrun.

"The superiority of the united nations in munitions and ships must be overwhelming—so overwhelming that the Axis nations can never hope to catch up with it. In order to attain this overwhelming superiority the United States must build planes and tanks and guns and ships to the utmost limit of our national capacity. We have the ability and capacity to produce arms not only for our own forces but also for the armies, navies, and air forces fighting on our side.

"And our overwhelming superiority of armament must be adequate to put weapons of war at the proper time into the hands of those men in the conquered nations, who stand ready to seize the first opportunity to revolt against their German and Japanese oppressors, and against the traitors in their own ranks, known by the already infamous name of 'Quislings.' As we get guns to the patriots in those lands, they too will fire shots heard 'round the world.

"This production of ours in the United States must be raised far above its present levels, even though it will mean the dislocation of the lives and occupations of millions of our own people. We must raise our sights all along the production line. Let no man say it

report of the Special Committee of the Senate Investigating the National Defense Program under the chairman-

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cannot be done. It must be done—and we have undertaken to do it.

"I have just sent a letter of directive to the appropriate departments and agencies of our Government, ordering that immediate steps be taken:

"1. To increase our production rate of airplanes so rapidly that in this year, 1942, we shall produce 60,000 planes, 10,000 more than the goal set a year and a half ago. This includes 45,000 combat planes—bombers, dive-bombers, pursuit planes. The rate of increase will be continued, so that next year, 1943, we shall produce 125,000 airplanes, including 100,000 combat planes.

"2. To increase our production rate of tanks so rapidly that in this year, 1942, we shall produce 45,000 tanks; and to continue that increase so that next year, 1943, we shall produce 75,000 tanks.

"3. To increase our production rate of antiaircraft guns so rapidly that in this year, 1942, we shall produce 20,000 of them; and to continue that increase so that next year, 1943, we shall produce 35,000 antiaircraft guns.

"4. To increase our production rate of merchant ships so rapidly that in this year, 1942, we shall build 8,000,000 deadweight tons as compared with a 1941 production of 1,100,000. We shall continue that increase so that next year, 1943, we shall build 10,000,000 tons.

"These figures and similar figures for a multitude of other implements of war will give the Japanese and Nazis a little idea of just what they accomplished in the attack on Pearl Harbor.

"Our task is hard—our task is unprecedented—and the time is short. We must strain every existing armament-producing facility to the utmost. We must convert every available plant and tool to war production. That goes all the way from the greatest plants to the smallest—from the huge automobile industry to the village machine shop.

"Production for war is based on men and women—the human hands and brains which collectively we call labor. Our workers stand ready to work long hours; to turn out more in a day's work; to keep the wheels turning and the fires burning 24 hours a day, and 7 days a week. They realize well that on the speed and efficiency of their work depend the lives of their sons and their brothers on the fighting fronts.

"Production for war is based on metals and raw materials—steel,

ship of Senator Harry S. Truman, of Missouri, March 30, 1943,[6] and from the affidavit of Robert P. Patterson, Un-

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copper, rubber, aluminum, zinc, tin. Greater and greater quantities of them will have to be diverted to war purposes. Civilian use of them will have to be cut further and still further—and, in many cases, completely eliminated.

"War costs money. So far, we have hardly even begun to pay for it. We have devoted only 15 percent of our national income to national defense. As will appear in my Budget Message tomorrow, our war program for the coming fiscal year will cost $56,000,000,000 or, in other words, more than one-half of the estimated annual national income. This means taxes and bonds and bonds and taxes. It means cutting luxuries and other nonessentials. In a word, it means an all-out war by individual effort and family effort in a united country.

'Only this all-out scale of production will hasten the ultimate all-out victory. Speed will count. Lost ground can always be regained—lost time never. Speed will save lives; speed will save this Nation which is in peril; speed will save our freedom and civilization—and slowness has never been an American characteristic." 88 Cong. Rec. 32, 33–34 (1942).

[6] "Ever since the beginning of the last war there has been a constant effort to find an effective method of controlling war profits without impeding war production. The renegotiation law is the latest product of such efforts. To obtain speed we have had to use contracting methods that would never have been tolerated in peacetime. We granted cost-plus-fixed-fee contracts where the specifications were not known or had to be subject to numerous changes or where there was no time to prepare detailed specifications. We also granted lump-sum contracts for many items which had never before been made in quantity and for which estimates of cost were mere guesses. This was particularly true of the billions of dollars of war contracts which were hastily 'shoveled' out early in January 1942.

"Is the renegotiation law a necessary and desirable method of counteracting the wasteful effects of such necessary practices in early wartime procurement? Is it being administered in such a way as to give effect to the statutory intent? What changes, if any, are needed?

"As to the necessity and desirability of the renegotiation law:

"(1) Because of the wartime need for rapid procurement of materials of war, new materials with which there has been no previous manufacturing experience and other articles previously manufactured

der Secretary of War, dated August 3, 1945, in the form filed in each of the three cases before us.

The above-mentioned excerpts describe a demand for production of war supplies in proportions previously un-

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only in relatively small quantities, some procedure for subsequent price adjustment is necessary and desirable if excessive war profits and costs are to be avoided.

"(2) Taxes alone will not do the job because (*a*) higher corporate tax rates are likely to encourage higher costs and discourage economical production; (*b*) no scheme of taxation has been devised which is sufficiently flexible to provide an incentive for efficient low-cost production; (*c*) a profit percentage which would fairly reward one war contractor with one type of financial structure would bankrupt a second contractor with a different financial set-up, and would provide inordinately excessive profits for a third contractor with a still different financial problem.

"(3) War contractors in most cases can protect themselves against loss by escalator clauses and other contract provisions for contingencies. The people can obtain protection in many cases only through some procedure such as renegotiation.

"(4) Experience has shown 'cost-plus' contracts to be worse than worthless in the effort to prevent excessive costs. They strongly tend to increase costs instead of the reverse.

"The administration of the renegotiation law during the first 10 months of its existence has been characterized by two significant accomplishments:

"(1) The assembly in Government of an unusual group of able, conscientious, and patriotic lawyers, accountants, and businessmen as administrators of renegotiation;

"(2) The gradual education of war contractors as to the reasons for and importance of their adopting a policy of tailoring their own profits to levels which, in their own special situations, are fair both to them and to the Government.

"On the other hand, the administration of the renegotiation law and the law itself are properly subject to certain constructive criticisms:

"(1) Substantial variations in administrative policy and attitude still exist among the four departments charged with responsibility for renegotiation, although this condition has been noticeably improved in recent weeks. The existence of such a condition has

imagined. They call for production in a volume never before approximated and at an undreamed of speed. The results amply demonstrated the infinite value of that production in winning the war. It proved to be a *sine*

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created wholly unnecessary confusion, uncertainty, and misunderstanding among contractors.

"(2) Results of Navy renegotiations to date justify an inference that in its early proceedings the Navy Price Adjustment Board may have been too strongly influenced by a desire to achieve the same kind of mathematical exactness which results from a cost-plus-a-percentage-of-cost contract, a result which is inconsistent with the flexibility which was the basic purpose of the renegotiation law.

"(3) Army administration has been rendered unnecessarily cumbersome by use of military channels in the handling of an essentially business and financial enterprise.

"(4) The principles and results of renegotiation have been shrouded with entirely too much secrecy not only as to the public but as to the renegotiators themselves, causing many war contractors to be distracted by wholly unwarranted but nevertheless natural fears of the unknown.

"(5) In some cases the cost audits incident to renegotiation and taxation have been unnecessarily duplicatory.

"(6) It is impossible to recover every last dollar of excessive war profits without unnecessarily interfering with war production, and overzealous administration of the vast powers delegated by this law could be seriously detrimental to war procurement." S. Rep. No. 10, Part 5, 78th Cong., 1st Sess. 1–3 (1943).

"5. The necessary result of this combination of circumstances is that the war procuring agencies cannot use normal methods of procurement. The pressing need for speed requires the abandonment of drawn-out negotiation and the careful surveys of all relevant factors which sound purchasing would otherwise require. Competition necessarily wanes and no longer offers an adequate guide to the prices which should be paid. Above all, the forecasting of costs of production becomes, in large measure, a matter of informed guessing rather than of real cost analysis. This is true in the case of new products, new plants, and new producers; it is likewise true, though perhaps in lesser degree, wherever the quantities to be manufactured are sharply increased over pre-war amounts. Accordingly, advance prices quoted in good faith by manufacturers in a large

*qua non* condition of the survival of the nation. Not only was it "necessary and proper" for Congress to provide for such production in the successful conduct of the war, but it was well within the outer limits of the consti-

number of cases have little relation to costs actually experienced in the course of production. Furthermore, many manufacturers feel unable to quote firm prices without including reserves to cover many contingencies the occurrence of which might skyrocket their costs, and so overturn all their estimates.

"6. These were the conditions of wartime procurement, after December 7, 1941, and the War Department had to force its procurement activities into their mold. Efforts were made, of course, to develop contractual devices which would minimize the paramount difficulty in estimating production costs. The cost-plus-fixed-fee contract was used where unavoidable, but this form has the disadvantage of removing financial incentives to efficiency and of imposing a heavy burden of auditing upon the Government and the contractor. Escalator clauses, permitting prices to be adjusted according to fluctuations in indices of labor and material costs, were also used but proved unworkable. Letters of intent, under which manufacture was commenced prior to the negotiation of a formal contract, helped to speed production, but could not, of course, solve the ultimate problem of decreasing costs and preventing excessive profits.

"7. Shortly after the declarations of war, both the legislative and the executive branches of the Government realized that excessive wartime profits were certain to accrue unless counter measures were taken. The evil effect of such wartime excessive profit on the morale of the fighting forces and the civilian population, as well as the unnecessary financial burden upon the Government, could not be ignored. The example of the last war was still fresh. Many war contractors realized the dangers and inequities resulting from such excessive profit, and some of them made refunds of excessive profits or voluntarily reduced their prices. In the spring of 1942, the War Department developed cost analysis units to check, so far as practicable, on production costs, and set up a price adjustment board to negotiate with contractors for voluntary price reductions and refunds of past payments. Tentative policies as to what profits were excessive were established and meetings with contractors had. At the same time, there came into use contract clauses providing for the renegotiation or redetermination of contract prices after an initial

tutional discretion of Congress and the President to do so under the terms of the Renegotiation Act. Accordingly, the question before us as to the constitutionality of the Renegotiation Act is not that of the power of the gov-

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period of production had laid a basis for the proper estimation of costs. We hoped that these means would keep incentives to efficiency alive and at the same time would tend to eliminate undue profits such as were then coming to light.

"8. The Congress apparently felt, however, that these contractual measures, resting as they did upon the voluntary cooperation of a relatively small number of war contractors, did not provide enough certainty that excessive profits would be eliminated. The Vinson-Trammel Act, limiting profits on aircraft and ship construction, had been repealed in 1940, but an effort was made to revive it. In March, 1942, the War Department and the War Production Board opposed such legislation on the ground that a flat percentage profit limitation would impede production and would be unfair to many contractors and too generous to others. After the Case amendment imposing such a flat percentage limitation on profits from war contracts had been adopted by the House of Representatives late in March, 1942, the armed services and the War Production Board offered a substitute proposal giving statutory authority to the process of voluntary renegotiation which had been developing. Congress adopted the principle of renegotiation with which the armed services were in accord (rather than the principle of a flat percentage limitation of profits), and it also endowed the procuring agencies with power to determine excessive profits when no bilateral agreement could be reached with the contractor. I believe that this addition by the Congress of the power of unilateral action was a wise and a necessary one, and that without it renegotiation would not have accomplished anything like the results that have been achieved.

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"12. . . . Some conception of the vast scope of the procurement activity of the armed services after the attack on Pearl Harbor can be gained from the fact that the total expenditures of the War and Navy Departments for the one fiscal year ending June 30, 1942 ($22,905,000,000) considerably exceeded the total military and naval expenditures of the Government from 1789 through the end of World War I." Affidavit of Robert P. Patterson, Under Secretary of War, sworn to August 3, 1945.

ernment to renegotiate and recapture war profits. The only questions are whether the particular method of renegotiation and the administrative procedure prescribed conformed to the constitutional limitations under which Congress was permitted to exercise its basic powers.

Our first question relates to the method of adjusting net compensation for war services through the compulsory "renegotiation" of profits under existing contracts between private parties, including recourse to unilateral orders for payments into the Treasury of the United States of such portions of those profits as were determined by the administrative officials of that Government to be "excessive profits." There were added the limitations that the contracts were for war goods in time of war, the ultimate payment for which was, in any event, to come from the Government and that, at the time of this impingement of the Renegotiation Act upon them, the contracts must not have been completed to the extent that final payments had been made on them.

One approach to the question of the constitutional power of Congress over the profits on these contracts is to recognize that Congress, in time of war, unquestionably has the fundamental power, previously discussed, to conscript men and to requisition the properties necessary and proper to enable it to raise and support its Armies. Congress furthermore has a primary obligation to bring about whatever production of war equipment and supplies shall be necessary to win a war. Given this mission, Congress then had to choose between possible alternatives for its performance. In the light of the compelling necessity for the immediate production of vast quantities of war goods, the first alternative, all too clearly evident to the world, was that which Congress did not choose, namely, that of mobilizing the productive capacity of the nation into a governmental unit on the totalitarian model. This would have meant the conscription of property and of

workmen. It would have meant the raising of supplies for the Armies in much the same manner as that in which Congress raised the manpower for such Armies. Already the nation had some units of production of military supplies in the form of arsenals, navy yards, and in the increasing number of governmentally owned, if not operated, war material plants. The production of the atomic bombs was one example of a war industry owned and operated exclusively by the Government. Faced with this ironical alternative of converting the nation in effect into a totalitarian state in order to preserve itself from totalitarian domination, that alternative was steadfastly rejected. The plan for Renegotiation of Profits which was chosen in its place by Congress appears in its true light as the very symbol of a free people united in reaching unequalled productive capacity and yet retaining the maximum of individual freedom consistent with a general mobilization of effort.

Somewhat crude in its initial statutory simplicity, the Renegotiation Act developed rapidly as the demand for war production increased beyond precedent. First approved April 28, 1942, less than five months after our declaration of war, the Act was adjusted and strengthened in its effectiveness and fairness by the numerous amendments made to it.[8] The nation previously had experienced different, but fundamentally comparable, federal regulation of civilian liberty and property in proportion to the increasing demands of modern warfare.[9]

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[8] See note 1, *supra*.

[9] *McKinley* v. *United States*, 249 U. S. 397 (regulations of local activities near federal military stations); *Northern Pacific R. Co.* v. *North Dakota*, 250 U. S. 135 (seizure and operation of railroads); *Hamilton* v. *Kentucky Distilleries and W. Co.*, 251 U. S. 146 (local liquor traffic); *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554 (seizure of enemy property); *Hirabayashi* v. *United States*, 320 U. S. 81 (curfew regulations); *Yakus* v. *United States*, 321 U. S. 414

The demands for war equipment and supplies were so great in volume, were for such new types of products, were subject to so many changes in specifications and were subject to such pressing demands for delivery that accurate advance estimates of cost were out of the question. Laying aside as undesirable the complete governmental ownership and operation of the production of war goods of all kinds, many alternative solutions were attempted. Often these called for capital expenditures by the Government in building new plant facilities. Adhering, however, to the policy of private operation of these facilities, Congress and the Administration sought to promote a policy of wide distribution of prime contracts and subcontracts, even to comparatively high cost marginal producers of unfamiliar products. Congress sought to do everything possible to retain and encourage individual

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(Emergency Price Control Act); *Bowles* v. *Willingham*, 321 U. S. 503 (rent control); and *Korematsu* v. *United States*, 323 U. S. 214 (exclusion of civilians from west coast military area).

In *Hirabayashi* v. *United States*, *supra*, this Court said (p. 93):

"The war power of the national government is 'the power to wage war successfully.' See Charles Evans Hughes, War Powers Under the Constitution, 42 A. B. A. Rep. 232, 238. It extends to every matter and activity so related to war as substantially to affect its conduct and progress. The power is not restricted to the winning of victories in the field and the repulse of enemy forces. . . . Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it. . . . Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs."

initiative in the world-wide race for the largest and quickest production of the best equipment and supplies. It clung to its faith in private enterprise. The problem was to find a fair means of compensation for the services rendered and the goods purchased. Contracts were awarded by negotiation wherever competitive bidding no longer was practicable. Contracts were let at cost-plus-a-fixed fee. Escalator clauses were inserted. Price ceilings were established. A flat percentage limit on the profits in certain lines of production was tried. Excess profits taxes were imposed. Appeals were made for voluntary refunds of excessive profits. However, experience with these alternatives convinced the Government that contracts at fixed initial prices still provided the best incentive to production.[10]

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[10] "20. At the beginning of the limited emergency in 1939, the only applicable statutory limits on profits from the sale of military or naval supplies were contained in the Vinson-Trammel Act of March 27, 1934, as amended (relating to naval vessels) and the Merchant Marine Act of 1936, as amended (relating to construction of merchant ships). The Act of April 3, 1939, extended percentage profit limitation to cover Army aircraft contracts. The percentage of profit allowed to contractors was lowered to approximately 8% by the Act of June 28, 1940, but the Second Supplemental National Defense Appropriation Act, 1941, enacted September 9, 1940, provided that as to aircraft the old limitation of 12% was to prevail.

"21. . . . Accordingly, the Second Revenue Act of 1940, containing the excess profits tax, suspended the profit limitation statutes applicable to Army and Navy contracts entered into after December 31, 1939, or uncompleted on that date by contractors and subcontractors subject to the new excess profits tax. Thereafter, until the passage of the Sixth Supplemental National Defense Appropriation Act of 1942, the only statutory provisions concerning war or defense contracts were those of the excess profits tax." Affidavit of Robert P. Patterson, Under Secretary of War, sworn to August 3, 1945.

And see Hensel and McClung, *Profit Limitation Controls Prior to the Present War*, 10 Law & Contemp. Prob. 187 (1943-1944).

On February 16, 1942, this Court in *United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289, pointed to the possibility of legislative relief. It said (p. 309):

> "The problem of war profits is not new. In this country, every war we have engaged in has provided opportunities for profiteering and they have been too often scandalously seized. See Hearings before the House Committee on Military Affairs on H. R. 3 and H. R. 5293, 74th Cong., 1st Sess., 590–598. To meet this recurrent evil, Congress has at times taken various measures. It has authorized price fixing. It has placed a fixed limit on profits, or has recaptured high profits through taxation. It has expressly reserved for the Government the right to cancel contracts after they have been made. Pursuant to Congressional authority, the Government has requisitioned existing production facilities or itself built and operated new ones to provide needed war materials. It may be that one or some or all of these measures should be utilized more comprehensively, or that still other measures must be devised. But if the Executive is in need of additional laws by which to protect the nation against war profiteering, the Constitution has given to Congress, not to this Court, the power to make them."

Finally the compulsory renegotiation of contracts was authorized. The procedure outlined in the Original Renegotiation Act, April 28, 1942, was rapidly perfected. As it developed it required advance consents to such renegotiation to be written into the respective contracts and subcontracts for war goods prior to their award and finally it made express provision for a redetermination of the excessive profits, in a proceeding *de novo* before the Tax Court, wherever a war goods contractor or subcontractor was aggrieved by the administrative order. Throughout these developments extended congressional

and public consideration was given to the issues presented.[11]

The plan proved itself readily adaptable to the needs of the time. It called for initial contract estimates based

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[11] The following significant congressional hearings were publicly held:

Hearings before the Senate Committee on Finance on § 403 of Pub. L. No. 528, 77th Cong., 2d Sess. (September 22 and 23, 1942);

Hearings before a Subcommittee of the Senate Committee on Finance on § 403 of Pub. L. No. 528, 77th Cong., 2d Sess. (September 29 and 30, 1942);

Hearings before the Subcommittee of the House Committee on Appropriations on Mil. Est. App. Bill for 1944, 78th Cong., 1st Sess. 483–518, 571–580 (June 10, 1943);

Hearings before the Subcommittee of the Senate Committee on Appropriations on H. R. 2996 (Mil. Est. App. Bill for 1944), 78th Cong., 1st Sess. 22, 30–33, 125–138, 150–151 (1943);

Hearings before the House Committee on Naval Affairs, pursuant to H. R. Res. 30, Vol. 2, 78th Cong., 1st Sess. (June 10–30, 1943);

Hearings before the House Committee on Ways and Means on H. R. 2324, 2698 and 3015 (Renegotiation of War Contracts), 78th Cong., 1st Sess. (September 9–23, 1943);

Hearings before the Senate Committee on Finance on H. R. 3687 (Revenue Act of 1943), 78th Cong., 1st Sess. 49, 388–392, 402–424, 443–452, 465, 469, 598–601, 620–629, 669–684, 690–696, 925–926, 987–1111, 1121–1132 (November 29–December 15, 1943);

Hearings before the House Committee on Ways and Means on H. R. 2628 (extension of termination date of Renegotiation Act), 79th Cong., 1st Sess. (April 12–16, 1945).

In addition, private hearings and interviews appear to have been had by Congressional Committees.

The following major reports on the operation of the Renegotiation Act were issued by Congressional Committees:

H. R. Rep. No. 733, 78th Cong., 1st Sess. (October 7, 1943). Report of the Committee on Naval Affairs, pursuant to H. R. Res. 30 (Renegotiation of War Contracts);

Sen. Rep. No. 10, Part 5, 78th Cong., 1st Sess. (March 30, 1943). Additional Report of the Special Senate Committee Investigating the National Defense Program (Renegotiation of War Contracts);

Sen. Rep. No. 10, Part 16, 78th Cong., 2d Sess. 40–64, 192–199 (March 4, 1944). Additional Report of the Special Senate Commit-

upon the best available information at the time of entering into the contracts. Production proceeded at once on the basis of those estimates. Many factors were incapable of exact advance determination. The final net compensation, however, resulted from a renegotiation made after both parties had had the benefit of actual experience under the contract. This determination of the allowable profit was guided by many relevant factors. A list of commonly relevant factors was presented in an early administrative directive. Later such a list was enacted into the statute. Each administrative determination was made subject to a redetermination in a proceeding *de novo* in the Tax Court provided a timely petition for it was filed by the aggrieved contractor or subcontractor. The Act always has been limited in duration to a period during and shortly following the war. In most instances the Act has resulted in a disposition of cases by agreements reached between the parties.[12] The con-

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tee Investigating the National Defense Program (Third Annual Report);

H. R. Rep. No. 871, 78th Cong., 1st Sess. 75–90 (November 18, 1943), on H. R. 3687 (Revenue Bill of 1943);

Sen. Rep. No. 627, 78th Cong., 1st Sess. 98–119 (December 22, 1943), on H. R. 3687 (Revenue Bill of 1943);

H. R. Rep. No. 1079, 78th Cong., 2d Sess. 34–39, 76–88 (February 4, 1944), on H. R. 3687 (Conference Report on Revenue Act of 1943).

See also:

Renegotiation of War Contracts—Law, Debates and Other Legislative Materials—Compiled for the use of the House Committee on Ways and Means, 78th Cong., 1st Sess. (1943);

Data on Renegotiation of Contracts, Senate Committee on Finance (December 9, 1943).

[12] In its brief filed jointly in the present cases the Government has submitted the following statement as to the results of renegotiation:

"11. *The results of renegotiation:* We are advised by the War Contracts Price Adjustment Board that as of June 30, 1947, 118,101

troversies which have survived to this day are, in large measure, not those dealing with the constitutionality of the general effect of the plan or even with the finality of redetermination under the prescribed administrative procedure, but are those arising out of an alleged abuse of discretion in its administration.

### THE RENEGOTIATION ACT.

While there have been six legislative steps[13] in the development of the Renegotiation Act, the portions of it that are especially material here consist of certain language in the so-called Original Renegotiation Act contained in § 403 of the Sixth Supplemental Defense Appropriations Act, approved April 28, 1942;[14] in the amendments made by the Revenue Act of 1942, October

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contractors had been assigned for renegotiation with respect to 1942 through 1946 fiscal years, and contracts aggregating over $190,000,000,000 (excluding contractors eliminated because of exemptions or non-coverage) were subjected to renegotiation. Of the total assignments, 115,535 (or 97.8%) were completed as of June 30, 1947. Out of the 115,535 completed assignments, 85,037 (or 73.6%) resulted in cancellations or clearances indicating that no excessive profits had been made or that the contractor was found to be exempt from renegotiation; 28,889 (or 25%) resulted in bilateral refund agreements between the Government and the contractor; 1,609 (or 1.4%) resulted in unilateral determinations by the Departments or the War Contracts Price Adjustment Board. Of the 30,498 assignments involving determinations of excessive profits, 1,609 (or 5.28%) were unilateral determinations and 28,889 (or 94.72%) were bilateral.

"Also as of June 30, 1947, the gross recoveries through renegotiation amounted to some $10,434,637,000, and the estimated net recovery (after deduction of the federal tax credit allowed contractors on renegotiation refunds) amounted to $3,130,391,000. Of the total gross recoveries of $10,434,637,000, some $895,493,000 (or 8.58%) were involved in unilateral determinations and the rest were recovered by voluntary agreement."

[13] See note 1, *supra*.

[14] For relevant excerpts from its text, see Appendix I, *infra*.

21, 1942;[15] and its further amendment and substantial expansion by § 701 (b) of the Revenue Act of 1943, February 25, 1944.[16] In that form it is sometimes called the Second Renegotiation Act, but the entire § 403, both in its original and amended form may be properly cited as the "Renegotiation Act."[17] In the proceedings leading up to the enactment of the Original Renegotiation Act, an alternative in the form of a rigid limitation of profits was rejected in favor of the more flexible definition embodied in the term "excessive profits."[18] The War Department Directive of August 10, 1942, entitled "Principles, Policy and Procedure to be Followed in Renegotiation" promptly stated the factors to be stressed in determining excessive profits. This directive was introduced in the hearings held by the Finance Committee of the Senate in September[19] and thus was before the Senate at the time of the passage of the above-mentioned Revenue Act of 1942, October 21, 1942, which made important amendments in the Renegotiation Act.

The "Joint Statement by the War, Navy, and Treasury Departments and the Maritime Commission—Purposes, Principles, Policies, and Interpretations" dealing with the

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[15] For relevant excerpts from its text, see Appendix II, *infra*.

[16] For relevant excerpts from its text, see Appendix III, *infra*.

[17] See § 403 (l) in note 1, *supra*.

[18] In the House of Representatives, the Case Amendment, providing in effect a limitation of 6% on war profits was adopted without debate. 88 Cong. Rec. 3139–3140 (1942). Before the Senate Subcommittee on Appropriations strong objection was made to this provision by the representatives of the Government and its omission was recommended by the Senate Committee on Appropriations. After ample consideration it was omitted in the Act as passed. 88 Cong. Rec. 3378–3405; 3582–3599; 3647–3662; 3666 (1942), and see H. R. Rep. No. 2030, 77th Cong., 2d Sess. 8–10 (1942).

[19] Hearings before the Subcommittee of the Senate Committee on Finance on Pub. L. No. 528, 77th Cong., 2d Sess. 16–28 (September 29, 1942).

Renegotiation Act was issued March 31, 1943. This was considered at the Hearings before the House Committee on Naval Affairs, 78th Cong., 1st Sess., Vol. 2, pp. 469, *et seq.*, 1025–1039, especially 1028–1029 (1943). Finally the above-mentioned Revenue Act of 1943, 58 Stat. 21, on February 25, 1944, largely incorporated these views in § 403 (a) (4) (A),[20] thus indicating congressional approval of this administrative practice and further assuring continuity of it during the balance of the life of the Act.

DELEGATION OF AUTHORITY UNDER THE RENEGOTIATION ACT.

The petitioners contend that the Renegotiation Act unconstitutionally attempted to delegate legislative power to administrative officials. The United States does not contest the right of the courts to decide the issues as to the validity of the Act on its face in the present cases, each of which was instituted after the petitioners' respective rights to a Tax Court redetermination had been forfeited. We find no reason for not reaching here the constitutionality of the Act. Cf. *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752; *Wade* v. *Stimson*, 331 U. S. 793; *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540; *Yakus* v. *United States*, 321 U. S. 414.

The constitutional argument is based upon the claim that the delegation of authority contained in the Act carried with it too slight a definition of legislative policy and standards. Accordingly, it is contended that the resulting determination of excessive profits which were claimed by the United States amounted to an unconstitutional exercise of legislative power by an administrative official instead of a mere exercise of administrative discretion under valid legislative authority. We hold that the authorization was constitutional. Certainly as

[20] See Appendix III, *infra*.

spelled out in § 403 (a) (4) (A)[21] of the Second Renegotiation Act with respect to fiscal years ending after June 30, 1943, there can be no objection on this ground. This question, therefore, relates to the delegation of authority as made by the Act before the effective date of the Second Renegotiation Act. The argument on this question is limited to the *Lichter* and *Alexander* cases, inasmuch as the excessive profits determined to exist in the *Pownall* case were so found by the War Contracts Price Adjustment Board under the Second Renegotiation Act.

*1. The Statutory Language.*

The Original Renegotiation Act,[22] approved April 28, 1942, provided in § 403 (b), (c), (d) and (e) for the renegotiation of all contracts and subcontracts thereafter made and also of all contracts and subcontracts theretofore made by the War Department, the Navy Department or the Maritime Commission, whether or not such contracts or subcontracts contained a renegotiation or recapture clause, provided the final payment pursuant thereto had not been made prior to April 28, 1942. The renegotiation was to be done by the Secretary of the Department concerned. For this purpose the Chairman of the Maritime Commission was included in the term "Secretary." The services of the Bureau of Internal Revenue were made available upon the request of each Secretary, subject to the consent of the Secretary of the Treasury, for the purposes of making examinations and determinations with respect to profits under the Section. The Secretary of each Department was authorized and directed, whenever in his opinion excessive profits had been realized or were likely to be realized from any contract with such Department or from any subcontract thereunder, to require the contractor or subcontractor to renegotiate the contract

[21] See Appendix III, *infra*.

[22] See Appendix I, *infra*.

price. In case any amount of the contract price was found as a result of such renegotiation to represent "excessive profits" which had been paid to the contractor or subcontractor, the Secretary was authorized to recover them.

There was no express definition of the term "excessive profits" in the Original Renegotiation Act. However, in its § 403 (b),[23] there was a relevant statement in connection with the renegotiation clauses required to be inserted in future contracts and subcontracts for an amount in excess of $100,000 each. The Secretary was required to insert in such contracts, thereafter made by his Department, "a provision for the renegotiation of the contract price at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty; . . . ." Contractors were also to be required to insert a like provision in their subcontracts. This statement indicated a relationship between current "excessive profits" and those which later might be determined with "reasonable certainty."

Also, in § 403 (d)[24] it was provided that, in renegotiating a contract price or determining excessive profits, the Secretaries of the respective Departments should not make allowances "for any salaries, bonuses, or other compensation paid by a contractor to its officers or employees in excess of a reasonable amount, . . ." nor "for any excessive reserves set up by the contractor or for any costs incurred by the contractor which are excessive and unreasonable."

The amendments made to this Section by the Revenue Act of 1942,[25] approved October 21, 1942, were made effective as of April 28, 1942. At the time they were approved, Congress had knowledge of the War Depart-

[23] See Appendix I, *infra*.
[24] See Appendix I, *infra*.
[25] See Appendix II, *infra*.

ment Directive of August 10, 1942,[26] which had been put into effect stressing certain factors which the Secretary emphasized in determining excessive profits. While Congress then made several amendments to § 403, those amendments did not alter the effect of such directive in this particular. Among the amendments then added there was the following purported definition of "excessive profits": "The term 'excessive profits' means any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits." In the light of the existing administrative practices this at least expressed a congressional satisfaction with the existing specificity of the Act. The amendment made to § 403 (c) (3)[27] required the recognition of exclusions and deductions of the character afforded by certain provisions of the Internal Revenue Code. The amendment to § 403 (c) (5)[28] provided also that the Secretaries, by joint regulation, might prescribe the form and detail in which certain data might be filed by contractors and subcontractors bearing upon their profits under their contracts. This material concerned "statements of actual costs of production" and "other financial statements for any prior fiscal year or years." Under some circumstances, in the absence of a notice from the Secretary and in the absence of the commencement of renegotiations, it was provided that "the contractor or subcontractor shall not thereafter be required to renegotiate to eliminate excessive profits realized from any such contract or subcontract during such fiscal year or years and any liabilities of the contractor or subcontractor for excessive profits

[26] Published as part of the material submitted by Under Secretary of War Robert P. Patterson at the Hearings on the Renegotiation of Contracts before a Subcommittee of the Senate Committee on Finance on § 403 of Pub. L. No. 528, 77th Cong., 2d Sess. 28, 34–43 (September 29, 1942).

[27] See Appendix II, *infra*.

[28] See Appendix II, *infra*.

realized during such period shall be thereby discharged." A new subsection (i)[29] was added containing new exceptions and exemptions from the Act. The "Joint Statement by the War, Navy, and Treasury Department and the Maritime Commission—Purposes, Principles, Policies, and Interpretations" issued March 31, 1943,[30] similarly contributed definiteness to the current administrative practice.

*2. The Validity of the Delegation of Authority.*

It is in the light of these statutory provisions and administrative practices that we must determine whether the Renegotiation Act made an unconstitutional delegation of legislative power. On the basis of (a) the nature of the particular constitutional powers being employed, (b) the current administrative practices later incorporated into the Act and (c) the adequacy of the statutory term "excessive profits" as used in this context, we hold that the authority granted was a lawful delegation of administrative authority and not an unconstitutional delegation of legislative power.

(a) *A constitutional power implies a power of delegation of authority under it sufficient to effect its purposes.*—This power is especially significant in connection with constitutional war powers under which the exercise of broad discretion as to methods to be employed may be essential to an effective use of its war powers by Congress. The degree to which Congress must specify its policies and standards in order that the administrative authority granted may not be an unconstitutional delegation of its own legislative power is not capable of precise definition. In peace or in war it is essential that the Constitution be

[29] See Appendix II, *infra*.

[30] See Hearings before the House Committee on Naval Affairs, 78th Cong., 1st Sess., Vol. 2, pp. 469, *et seq.*, 1025–1039, especially 1028–1029 (1943).

scrupulously obeyed,[31] and particularly that the respective branches of the Government keep within the powers assigned to each by the Constitution. On the other hand, it is of the highest importance that the fundamental purposes of the Constitution be kept in mind and given effect in order that, through the Constitution, the people of the United States may in time of war as in peace bring to the support of those purposes the full force of their united action. In time of crisis nothing could be more tragic and less expressive of the intent of the people than so to construe their Constitution that by its own terms it would substantially hinder rather than help them in defending their national safety.

In an address by Honorable Charles E. Hughes, of New York, on "War Powers Under The Constitution,"

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[31] "The question remains: What may be deemed to be the force and effect in time of war of the restrictive provisions contained in the constitution with respect to the exercise of federal authority? It is manifest, at once, that the great organs of the National Government retain and perform their functions as the constitution prescribes. Senators and Representatives are qualified and chosen as provided in the constitution and the legislative power vested in the Congress must be exercised in the required manner. The President is still the constitutional Executive, elected in the manner provided and subject to the restraints imposed upon his office. The judicial power of the United States continues to be vested in one Supreme Court and such inferior courts as Congress has ordained. Again, apart from the provisions fixing the framework of the Government, there are limitations which by reason of their express terms or by necessary implication must be regarded as applicable as well in war as in peace. Thus one of the expressed objects of the power granted to Congress 'to lay and collect Taxes, Duties, Imposts, and Excises' is to 'provide for the common defence,' and it cannot be doubted that taxes laid for this purpose, that is, to support the army and navy and to provide the means for military operations, must be laid subject to the constitutional restrictions." Address by Honorable Charles E. Hughes, of New York, on "War Powers Under the Constitution," September 5, 1917, 42 A. B. A. Rep. 232, 241–242.

September 5, 1917, 42 A. B. A. Rep. 232, 238–239, 247–248, he said:

"The power to wage war is the power to wage war successfully. The framers of the constitution were under no illusions as to war. They had emerged from a long struggle which had taught them the weakness of a mere confederation, and they had no hope that they could hold what they had won save as they established a Union which could fight with the strength of one people under one government entrusted with the common defence. In equipping the National Government with the needed authority in war, they tolerated no limitations inconsistent with that object, as they realized that the very existence of the Nation might be at stake and that every resource of the people must be at command. . . .

. . . . . .

"The extraordinary circumstances of war may bring particular business[es] and enterprises clearly into the category of those which are affected with a public interest and which demand immediate and thoroughgoing public regulation. The production and distribution of foodstuffs, articles of prime necessity, those which have direct relation to military efficiency, those which are absolutely required for the support of the people during the stress of conflict, are plainly of this sort. Reasonable regulations to safeguard the resources upon which we depend for military success must be regarded as being within the powers confided to Congress to enable it to prosecute a successful war.

"In the words of the Supreme Court: 'It is also settled beyond dispute that the Constitution is not self-destructive. In other words, that the power which it confers on the one hand it does not immedi-

ately take away on the other. . . .'[32] This was said in relation to the taxing power. Having been granted in express terms, the Court held it had not been taken away by the due process clause of the Fifth Amendment. As the Supreme Court put it in another case: 'the Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same power away on the other by the limitations of the due process clause.'"[33]

"Similarly, it may be said that the power has been expressly given to Congress to prosecute war, and to pass all laws which shall be necessary and proper for carrying that power into execution. That power explicitly conferred and absolutely essential to the safety of the Nation is not destroyed or impaired by any later provision of the constitution or by any one of the amendments. These may all be construed so as to avoid making the constitution self-destructive, so as to preserve the rights of the citizen from unwarrantable attack, while assuring beyond all hazard the common defence and the perpetuity of our liberties. These rest upon the preservation of the nation.

"It has been said that the constitution marches. That is, there are constantly new applications of unchanged powers, and it is ascertained that in novel and complex situations, the old grants contain, in their general words and true significance, needed and adequate authority. So, also, we have a *fighting* constitution. We cannot at this time fail to appreciate the wisdom of the fathers, as under this charter, one hundred and thirty years old—the constitution of Washington—the people of the United States fight

[32] *Billings* v. *United States*, 232 U. S. 261, 282.

[33] *Brushaber* v. *Union Pacific R. Co.*, 240 U. S. 1, 24.

with the power of unity,—as we fight for the freedom of our children and that hereafter the sword of autocrats may never threaten the world."

The war powers of Congress and the President are only those which are to be derived from the Constitution but, in the light of the language just quoted, the primary implication of a war power is that it shall be an effective power to wage the war successfully. Thus, while the constitutional structure and controls of our Government are our guides equally in war and in peace, they must be read with the realistic purposes of the entire instrument fully in mind.[34]

In 1942, in the early stages of total global warfare, the exercise of a war power such as the power "To raise and support Armies, . . ." and "To provide and maintain a Navy; . . . ," called for the production by us of war goods in unprecedented volume with the utmost speed, combined with flexibility of control over the product and with a high degree of initiative on the part of the producers. Faced with the need to exercise that power, the question was whether it was beyond the constitutional power of Congress to delegate to the high officials named therein the discretion contained in the Original Renegotiation Act of April 28, 1942, and the amendments of October 21, 1942. We believe that the administrative authority there granted was well within the constitutional war powers then being put to their predestined uses.

(b) *The administrative practices developed under the Renegotiation Act demonstrated the definitive adequacy*

[34] "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, *provide for the common defence*, promote the general Welfare, and *secure the Blessings of Liberty to ourselves and our Posterity*, do ordain and establish this Constitution for the United States of America." (Italics supplied.) U. S. Const. Preamble.

*of the term "excessive profits" as used in the Act.*—The administrative practices currently developed under the Act in interpreting the term "excessive profits" appear to have come well within the scope of the congressional policy. We have referred above to the War Department Directive of August 10, 1942,[35] and to the Joint Departmental Statement of March 31, 1943,[36] both of which were placed before appropriate Congressional Committees. These clearly stated practices are evidence of a current correct understanding of the congressional intent. This appears from the fact that the congressional action of October 21, 1942, made effective as of April 28, 1942, was taken in the light of the above-mentioned directive and without restricting its effect. Furthermore, the congressional action taken February 25, 1944, and made effective for the fiscal years ending after June 30, 1943, substantially incorporated into the statute the administrative practice shown in the Joint Departmental Statement of March 31, 1943. It thus became an express congressional definition of the factors appropriate for consideration in determining excessive profits, whereas before it was an administrative interpretation of "excessive profits" to the same effect.

(c) *The statutory term "excessive profits," in its context, was a sufficient expression of legislative policy and standards to render it constitutional.*—The fact that this term later was further defined both by administrative action and by statutory amendment indicates the probable desirability of such added definition, but it does not demonstrate that such further definition was a constitutional necessity essential to the validity of the original exercise by Congress of its war powers in initiating a new solution of an unprecedented problem. The fact that the congressional definition confirmed the administrative

[35] See notes 19 and 26, *supra*.

[36] See note 30, *supra*.

practice which already was in effect under the original statutory language tends to show that a statutory definition was not necessary in order to give effect to the congressional intent.

In 1942 the imposition of excess profits taxes was a procedure already familiar to Congress, both as an emergency procedure to raise funds for extraordinary wartime expenditures, and as one to meet the needs of peace. The recapture of excess income as applied by Congress to the railroads had been upheld by this Court in 1924. *Dayton-Goose Creek R. Co.* v. *United States*, 263 U. S. 456. The opinions of this Court in *Yakus* v. *United States*, 321 U. S. 414; *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 529–542; and *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 413–433, are not in conflict with our present position.

The policy and purpose of Congress in choosing the renegotiation of profits as an alternative to cost-plus contracts, to flat percentage limitations of profits, and to 100% excess profits taxes was an attempt to determine a fair return on war contracts, under conditions where actual experience alone could disclose what was fair and when the primary national need was for the immediate production of unprecedented quantities of new products. The action of Congress was an expression of its well-considered judgment as to the degree of administrative authority which it was necessary to grant in order to effectuate its policy. This action of Congress came within the scope of its discretion as described by Chief Justice Hughes in *Panama Refining Co.* v. *Ryan, supra*, at p. 421:

> "Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility

> and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility."

It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program. "If Congress shall lay down by legislative act an intelligible principle . . . such legislative action is not a forbidden delegation of legislative power." *Hampton Co.* v. *United States*, 276 U. S. 394, 409. Standards prescribed by Congress are to be read in the light of the conditions to which they are to be applied. "They derive much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear." *American Power & Light Co.* v. *S. E. C.*, 329 U. S. 90, 104. The purpose of the Renegotiation Act and its factual background establish a sufficient meaning for "excessive profits" as those words are used in practice.[37] The word "excessive" appears twice in the Eighth Amendment to the Constitution: "Excessive bail shall not be required, nor excessive fines imposed, . . . ." In the Original Renegotiation Act, § 403 (d),[38] there were expressly disallowed to the contractor in determining his

[37] Excessive means: "Characterized by, or exhibiting, excess; as: *a* Exceeding what is usual or proper; overmuch. *b* Greater than the usual amount or degree; exceptional; very great." Webster's New International Dictionary, 2d ed. (1938).

[38] See Appendix I, *infra*.

profits "compensation paid by a contractor to its officers or employees in excess of a reasonable amount, . . ." and "any costs incurred by the contractor which are excessive and unreasonable." "Excessive profits are those in excess of reasonable profits." *Spaulding* v. *Douglas Aircraft Co.*, 154 F. 2d 419, 423.

The following, somewhat comparable, legislative specifications are among those which have been held to state a sufficiently definite standard for administrative action:

"Just and reasonable" rates for sales of natural gas, *Federal Power Comm'n* v. *Hope Gas Co.*, 320 U. S. 591, 600–601; "public interest, convenience, or necessity" in establishing rules and regulations under the Federal Communications Act, *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 225–226; prices yielding a "fair return" or the "fair value" of property, *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 397–398; "unfair methods of competition" distinct from offenses defined under the common law, *Federal Trade Comm'n* v. *Keppel & Bro.*, 291 U. S. 304, 311–312, 314; "just and reasonable" rates for the services of commission men, *Tagg Bros. & Morehead* v. *United States*, 280 U. S. 420, 431; and "fair and reasonable" rent for premises, with final determination in the courts, *Levy Leasing Co.* v. *Siegel*, 258 U. S. 242, 243, 248–250.

*5. Methods Prescribed and Limitations Imposed on the Administration.*

The methods prescribed and the limitations imposed by Congress upon the contemplated administrative action are helpful. The Act is confined to the duration of the war or to a short time thereafter. Renegotiation, from the beginning, has been confined to the elimination of excessive profits from contracts and subcontracts with certain governmental departments directly related to the conduct of the war. By subsequent amendments the

scope of the Act was limited by further express exceptions and exemptions. The administrative officials to whom authority was granted were clearly specified and were all officials of high governmental responsibility. Each was required to act whenever he found excessive profits existed under the conditions defined. The provisions for a redetermination of excess profits by the Tax Court *de novo* are discussed later. They likewise imposed important limitations on the allowable recoveries.

Accordingly, we hold that the delegation of authority here in issue, under the Renegotiation Act in its several forms, was a constitutional definition of administrative authority and not an unauthorized delegation of legislative power.

THE RENEGOTIATION OF WAR CONTRACTS WAS NOT A TAKING OF PRIVATE PROPERTY FOR PUBLIC USE.

The recovery by the Government of excessive profits received or receivable upon war contracts is in the nature of the regulation of maximum prices under war contracts or the collection of excess profits taxes, rather than the requisitioning or condemnation of private property for public use. One of the primary purposes of the renegotiation plan for redetermining the allowable profit on contracts for the production of war goods by private persons was the avoidance of requisitioning or condemnation proceedings leading to governmental ownership and operation of the plants producing war materials. A refund to the Government of excessive earnings of railroad carriers under the recapture provisions of § 15a of the Transportation Act of 1920, 41 Stat. 488, has been sustained by this Court. *Dayton-Goose Creek R. Co.* v. *United States*, 263 U. S. 456. The collection of renegotiated excessive profits on a war subcontract also is not in the nature of a penalty and is not a deprivation of a subcontractor of his property without due process of law in violation of the Fifth Amendment.

THE RENEGOTIATION ACT, INCLUDING ITS AMENDMENTS, HAS BEEN PROPERLY APPLIED TO CONTRACTS ENTERED INTO BEFORE ITS AND THEIR RESPECTIVE ENACTMENTS.

The excessive profits claimed by the Government in these cases arose out of contracts between the respective petitioners and other private parties. None arose out of contracts made directly with the Government itself. All the contracts, however, related to subject matter within the meaning of the Renegotiation Act in its respective stages. The contracts all were of the type which came to be known, under the Act, as subcontracts. All, except four in the *Lichter* case, were entered into after the enactment of the Original Renegotiation Act, April 28, 1942, and on those four, the final payment had not been made by that date. We therefore do not have before us an issue as to the recovery of excessive profits on any contract made directly with the Government nor on any subcontract upon which final payment had been made before April 28, 1942, although relating to war goods made or services performed after the declaration of war, December 7, 1941. Congress limited the Renegotiation Act to future contracts and to contracts already existing but upon which final payments had not been made at the time of the passage of the original Act. These included contracts made directly with the Government and also subcontracts such as those here involved.

We uphold the right of the Government to recover excessive profits on each of the contracts before us. This right exists as to such excessive profits whether they arose from contracts made before or after the passage of the Act. A contract is equally a war contract in either event and, if uncompleted to the extent that the final payment has not yet been made, the recovery of excessive profits derived from it may be authorized as has been done here.

While the Original Renegotiation Act may not have expressly defined some of the contracts before us as subcontracts, the Act of October 21, 1942, in its amendments effective as of April 28, 1942, did so. Accordingly, the contracts entered into between private parties in the *Alexander* case between April 28, 1942, and October 21, 1942, come within the scope of the Renegotiation Act.

THE TAX COURT REMEDY.

Before the amendments incorporated in it on February 25, 1944, by the Revenue Act of 1943 (the so-called Second Renegotiation Act) the Original Renegotiation Act, as theretofore amended, did not provide expressly for a review or redetermination of the initial determination of the excess profits authorized to be made by the respective Secretaries. The 1944 amendments added not merely an express statement of factors to be taken into consideration in determining excessive profits (§ 403 (a) (4) (A)),[39] but also created a War Contracts Price Adjustment Board (§ 403 (d) (1))[40] to make such determinations in the future. Also, it provided expressly for petitions to be filed with the Tax Court to secure redeterminations of the orders of such Board. (§ 403 (e) (1).)[41] It expressly stated that "A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo." (§ 403 (e) (1).) It provided also that "In the absence of the filing of a petition with The Tax Court of the United States under the provisions of and within the time limit prescribed in subsection (e) (1), such order [of the Board] shall be final and conclusive and shall not be subject to review or redetermination by any court or other

[39] See Appendix III, *infra*.
[40] See Appendix III, *infra*.
[41] See Appendix III, *infra*.

agency." (§ 403 (c) (1).)[42] All of the determinations in the cases before us were made after February 25, 1944, and those in the *Pownall* case were made by the Board. The above procedure under § 403 (e) (1) accordingly was open to the petitioners in the *Pownall* case but they did not file a petition with the Tax Court.

In addition to the above procedures affecting future determinations of excessive profits to be made by the Board, the Second Renegotiation Act also made express provisions, in § 403 (e) (2),[43] for a redetermination by the Tax Court of excessive profits determined to exist by the respective Secretaries. These provisions applied first to any determinations made by a Secretary *prior to* February 25, 1944, with respect to a fiscal year ending before July 1, 1943. In those instances a petition for redetermination by the Tax Court was permitted to be filed within 90 days after February 25, 1944. We have no such case before us. These provisions applied also to any determination made by a Secretary *after* February 25, 1944, with respect to a fiscal year ending before July 1, 1943. In that event, a petition for redetermination by the Tax Court was permitted to be filed within 90 days after the date of the redetermination. We have such situations in the *Lichter* and *Alexander* cases.

No petitions were filed with the Tax Court in any of the cases before us, and the time for doing so has expired. Accordingly, here, as in *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752, 771, we do not have before us, and we do not express an opinion upon, the finality which would have attached to a redetermination by the Tax Court if such a redetermination had been sought and made. We have only the situations presented by the respective failures of the petitioners to resort to the Tax Court

[42] See Appendix III, *infra*.

[43] See Appendix III, *infra*.

in the face of the express statutory provisions made for such administrative relief.

As to the effect of the statute and of the course of action taken, we hold that the statute did afford procedural due process to the respective petitioners but that none of them made use of the procedure so provided for them. Consistent with the primary need for speed and definiteness in these matters, the original administrative determinations by the respective Secretaries or by the Board were intended primarily as renegotiations in the course of which the interested parties were to have an opportunity to reach an agreement with the Government or in connection with which the Government, in the absence of such an agreement, might announce its unilateral determination of the amount of excessive profit claimed by the United States. This initial proceeding was not required to be a formal proceeding producing a record for review by some other authority. In lieu of such a procedure for review, the Second Renegotiation Act provided an adequate opportunity for a redetermination of the excessive profits, if any, *de novo* by the Tax Court. "The demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective." *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 152–153.

We uphold the decisions below and the contentions of the Government to the effect that the statutory provision thus made for a petition to the Tax Court was not, in any case before us, an optional or alternative procedure. It provided the one and only procedure to secure a redetermination of the excessive profits which had been determined to exist by the orders of the respective Secretaries or of the Board in the cases before us. Failure of the respective petitioners to exhaust that procedure has left them with no right to present here issues such as those

as to coverage and the amount of profits which might have been presented there. Accordingly, there is excluded from our consideration in this proceeding the contention in the *Lichter* case that the petitioners' subcontracts were exempt from renegotiation on the ground that they were subcontracts under prime contracts with a Department of the Government and had been awarded to them as the result of competitive bidding for the construction of buildings and facilities. There is excluded also, for example, the contention in the *Pownall* case that petitioners' contracts which were for amounts under $100,000 each were not subject to renegotiation. Likewise, in the *Alexander* case, there is excluded the petitioner's contention that it had not made excessive profits within the meaning of the statute and that its contracts for processing wool were not "subcontracts" within the meaning of the Original Renegotiation Act.

For these reasons, we uphold the constitutionality of the Renegotiation Act on its face as authority for the recovery of excessive profits as ordered in the three respective cases before us, and we hold that the respective petitioners do not have the right to present questions as to the coverage of that Act, as to the amount of excessive profits adjudged to be due from them or as to other comparable issues which might have been presented by them to the Tax Court upon a timely petition to that court for a redetermination of excessive profits, if any.

Accordingly, in each of the cases before us, the judgment of the Circuit Court of Appeals is

*Affirmed.*

MR. JUSTICE MURPHY concurs in the result in these cases.

MR. JUSTICE JACKSON concurs in the result in the *Pownall* case, but dissents in the *Lichter* and *Alexander* cases.

# APPENDIX.

## I.

Excerpts from the so-called Original or First Renegotiation Act, § 403, Sixth Supplemental National Defense Appropriation Act, 1942, approved April 28, 1942, c. 247, 56 Stat. 226, 245–246.

"(a) . . . For the purposes of subsections (d) and (e) of this section, the term 'contract' includes a subcontract and the term 'contractor' includes a subcontractor.

"(b) The Secretary of each Department is authorized and directed to insert in any contract for an amount in excess of $100,000 hereafter made by such Department (1) a provision for the renegotiation of the contract price at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty; (2) a provision for the retention by the United States or the repayment to the United States of (A) any amount of the contract price which is found as a result of such renegotiation to represent excessive profits and (B) an amount of the contract price equal to the amount of the reduction in the contract price of any subcontract under such contract pursuant to the renegotiation of such subcontract as provided in clause (3) of this subsection; and (3) a provision requiring the contractor to insert in each subcontract for an amount in excess of $100,000 made by him under such contract (A) a provision for the renegotiation by such Secretary and the subcontractor of the contract price of the subcontract at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty, (B) a provision for the retention by the United States or the repayment to the United States of any amount of the contract price of the subcontract which is found as a result of such renegotiation, to represent excessive profits, and (C) a provision for relieving the contractor from any liability to the subcontractor on account of any amount so retained by or repaid to the United States.

"(c) The Secretary of each Department is authorized and directed, whenever in his opinion excessive profits have been realized, or are likely to be realized, from any contract with such Department or from any subcontract thereunder, (1) to require the contractor or subcontractor to renegotiate the contract price, (2) to withhold from the contractor or subcontractor any amount of the contract price

which is found as a result of such renegotiation to represent excessive profits, and (3) in case any amount of the contract price found as a result of such renegotiation to represent excessive profits shall have been paid to the contractor or subcontractor, to recover such amount from such contractor or subcontractor. Such contractor or subcontractor shall be deemed to be indebted to the United States for any amount which such Secretary is authorized to recover from such contractor or subcontractor under this subsection, and such Secretary may bring actions in the appropriate courts of the United States to recover such amount on behalf of the United States. All amounts recovered under this subsection shall be covered into the Treasury as miscellaneous receipts. This subsection shall be applicable to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, whether or not such contracts or subcontracts contain a renegotiation or recapture clause, provided that final payment pursuant to such contract or subcontract has not been made prior to the date of enactment of this Act.

"(d) In renegotiating a contract price or determining excessive profits for the purposes of this section, the Secretaries of the respective Departments shall not make any allowance for any salaries, bonuses, or other compensation paid by a contractor to its officers or employees in excess of a reasonable amount, nor shall they make allowance for any excessive reserves set up by the contractor or for any costs incurred by the contractor which are excessive and unreasonable. For the purpose of ascertaining whether such unreasonable compensation has been or is being paid, or whether such excessive reserves have been or are being set up, or whether any excessive and unreasonable costs have been or are being incurred, each such Secretary shall have the same powers with respect to any such contractor that an agency designated by the President to exercise the powers conferred by title XIII of the Second War Powers Act, 1942, has with respect to any contractor to whom such title is applicable. . . .

"(e) In addition to the powers conferred by existing law, the Secretary of each Department shall have the right to demand of any contractor who holds contracts with respect to which the provisions of this section are applicable in an aggregate amount in excess of $100,000, statements of actual costs of production and such other financial statements, at such times and in such form and detail, as such Secretary may require. . . ."

56 Stat. 245.

II.

Excerpts from Title VIII, Renegotiation of War Contracts, Revenue Act of 1942, approved October 21, 1942, c. 619, 56 Stat. 798, 982–985, 26 U. S. C. A. *Internal Revenue Acts Beginning 1940*, Revenue Act of 1942, § 801, p. 376.

Section 801 of the Revenue Act of 1942 amended the Section in several particulars, all effective as of April 28, 1942. Among the amendments were certain additions or changes contained in § 403 (a), § 403 (c) and § 403 (i) and reading as follows:

"SEC. 801. RENEGOTIATION OF WAR CONTRACTS.

"(a) Subsections (a), (b), and (c) of section 403 of the Sixth Supplemental National Defense Appropriation Act (Public 528, 77th Cong., 2d Sess.), are amended to read as follows:

"SEC. 403. (a) For the purposes of this section—

"(4) The term 'excessive profits' means any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits.

"(5) The term 'subcontract' means any purchase order or agreement to perform all or any part of the work, or to make or furnish any article, required for the performance of another contract or subcontract. The term 'article' includes any material, part, assembly, machinery, equipment, or other personal property.

"For the purposes of subsections (d) and (e) of this section, the term 'contract' includes a subcontract and the term 'contractor' includes a subcontractor.

"(c) (1) Whenever, in the opinion of the Secretary of a Department, the profits realized or likely to be realized from any contract with such Department, or from any subcontract thereunder whether or not made by the contractor, may be excessive, the Secretary is authorized and directed to require the contractor or subcontractor to renegotiate the contract price. When the contractor or subcontractor holds two or more contracts or subcontracts the Secretary in his discretion, may renegotiate to eliminate excessive profits on some or all of such contracts and subcontracts as a group without separately renegotiating the contract price of each contract or subcontract.

"(2) Upon renegotiation, the Secretary is authorized and directed to eliminate any excessive profits under such contract or subcontract (i) by reductions in the contract price of the contract

or subcontract, or by other revision in its terms; or (ii) by withholding, from amounts otherwise due to the contractor or subcontractor, any amount of such excessive profits; or (iii) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to the subcontractor, any amount of such excessive profits under the subcontract; or (iv) by recovery from the contractor or subcontractor, through repayment, credit or suit, of any amount of such excessive profits actually paid to him; or (v) by any combination of these methods, as the Secretary deems desirable. The Secretary may bring actions on behalf of the United States in the appropriate courts of the United States to recover from such contractor or subcontractor, any amount of such excessive profits actually paid to him and not withheld or eliminated by some other method under this subsection. The surety under a contract or subcontract shall not be liable for the repayment of any excessive profits thereon. All money recovered by way of repayment or suit under this subsection shall be covered into the Treasury as miscellaneous receipts.

"(3) In determining the excessiveness of profits realized or likely to be realized from any contract or subcontract, the Secretary shall recognize the properly applicable exclusions and deductions of the character which the contractor or subcontractor is allowed under Chapter 1 and Chapter 2E of the Internal Revenue Code. In determining the amount of any excessive profits to be eliminated hereunder the Secretary shall allow the contractor or subcontractor credit for Federal income and excess profits taxes as provided in section 3806 of the Internal Revenue Code.

"(4) Upon renegotiation pursuant to this section, the Secretary may make such final or other agreements with a contractor or subcontractor for the elimination of excessive profits and for the discharge of any liability for excessive profits under this section, as the Secretary deems desirable. Such agreements may cover such past and future period or periods, may apply to such contract or contracts of the contractor or subcontractor, and may contain such terms and conditions, as the Secretary deems advisable . . . .

"(5) Any contractor or subcontractor who holds contracts or subcontracts, to which the provisions of this section are applicable, may file with the Secretaries of all the Departments concerned statements of actual costs of production and such other financial statements for any prior fiscal year or years of such

contractor or subcontractor, in such form and detail, as the Secretaries shall prescribe by joint regulation. Within one year after the filing of such statements, or within such shorter period as may be prescribed by such joint regulation, the Secretary of a Department may give the contractor or subcontractor written notice, in form and manner to be prescribed in such joint regulation, that the Secretary is of the opinion that the profits realized from some or all of such contracts or subcontracts may be excessive, and fixing a date and place for an initial conference to be held within sixty days thereafter. If such notice is not given and renegotiation commenced by the Secretary within such sixty days the contractor or subcontractor shall not thereafter be required to renegotiate to eliminate excessive profits realized from any such contract or subcontract during such fiscal year or years and any liabilities of the contractor or subcontractor for excessive profits realized during such period shall be thereby discharged.

"(6) This subsection (c) shall be applicable to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, whether or not such contracts or subcontracts contain a renegotiation or recapture clause, unless (i) final payment pursuant to such contract or subcontract was made prior to April 28, 1942, . . ."

"(c) [SEC. 801.] Section 403 of the Sixth Supplemental National Defense Appropriation Act (Public 528, 77th Cong., 2d Sess.), is amended by adding at the end thereof the following subsections:

"(i) . . .

"(2) The Secretary of a Department is authorized, in his discretion, to exempt from some or all of the provisions of this section—

"(i) any contract or subcontract to be performed outside of the territorial limits of the continental United States or in Alaska;

"(ii) any contracts or subcontracts under which, in the opinion of the Secretary, the profits can be determined with reasonable certainty when the contract price is established, such as certain classes of agreements for personal services, for the purchase of real property, perishable goods, or commodities the minimum price for the sale of which has been fixed by a public regulatory body, of leases and license agreements, and of agreements where the period of per-

formance under such contract or subcontract will not be in excess of thirty days; and

"(iii) a portion of any contract or subcontract or performance thereunder during a specified period or periods, if in the opinion of the Secretary, the provisions of the contract are otherwise adequate to prevent excessive profits.

"The Secretary may so exempt contracts and subcontracts both individually and by general classes or types."

56 Stat. 982.

III.

Excerpts from the so-called Second Renegotiation Act, Title VII, Renegotiation of War Contracts, passed notwithstanding the objections of the President, February 25, 1944, c. 63, 58 Stat. 21, 78–92, 50 U. S. C. (Supp. V, 1946) § 1191; also 26 U. S. C. A. *Internal Revenue Acts Beginning 1940*, Revenue Act of 1943, § 701, p. 491.

While § 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as expanded by § 701 (b) of the Revenue Act, 1943, is too long for reproduction here, the following excerpts from it are especially relevant: § 403 (a) (4) (A); § 403 (c) (1); § 403 (d) (1); § 403 (d) (4); § 403 (e) (1); § 403 (e) (2); § 403 (l); see also, § 701 (d) of the Revenue Act of 1943:

SEC. 701. RENEGOTIATION OF WAR CONTRACTS.

(b) RENEGOTIATION OF WAR CONTRACTS.—Section 403, as amended, of the Sixth Supplemental National Defense Appropriation Act, 1942, is amended to read as follows:

"SEC. 403. (a) For the purposes of this section—

"(4) (A) The term 'excessive profits' means the portion of the profits derived from contracts with the Departments and subcontracts which is determined in accordance with this section to be excessive. In determining excessive profits there shall be taken into consideration the following factors:

"(i) efficiency of contractor, with particular regard to attainment of quantity and quality production, reduction of costs and economy in the use of materials, facilities, and manpower;

"(ii) reasonableness of costs and profits, with particular regard to volume of production, normal pre-war earnings, and comparison of war and peacetime products;

"(iii) amount and source of public and private capital employed and net worth;

"(iv) extent of risk assumed, including the risk incident to reasonable pricing policies;

"(v) nature and extent of contribution to the war effort, including inventive and developmental contribution and cooperation with the Government and other contractors in supplying technical assistance;

"(vi) character of business, including complexity of manufacturing technique, character and extent of subcontracting, and rate of turn-over;

"(vii) such other factors the consideration of which the public interest and fair and equitable dealing may require, which factors shall be published in the regulations of the Board from time to time as adopted.

"(c) (1) Whenever, in the opinion of the Board, the amounts received or accrued under contracts with the Departments and subcontracts may reflect excessive profits, the Board shall give to the contractor or subcontractor, as the case may be, reasonable notice of the time and place of a conference to be held with respect thereto. The mailing of such notice by registered mail to the contractor or subcontractor shall constitute the commencement of the renegotiation proceeding. At the conference, which may be adjourned from time to time, the Board shall endeavor to make a final or other agreement with the contractor or subcontractor with respect to the elimination of excessive profits received or accrued, and with respect to such other matters relating thereto as the Board deems advisable. Any such agreement, if made, may, with the consent of the contractor or subcontractor, also include provisions with respect to the elimination of excessive profits likely to be received or accrued. If the Board does not make an agreement with respect to the elimination of excessive profits received or accrued, it shall issue and enter an order determining the amount, if any, of such excessive profits, and forthwith give notice thereof by registered mail to the contractor or subcontractor. In the absence of the filing of a petition with The Tax Court of the United States under the provisions of and within the time limit prescribed in subsection (e) (1), such order shall be final and conclusive and shall not be subject to review or redetermination by any court or other agency. The Board shall exercise its powers with respect to the aggregate of the amounts received or accrued during the fiscal year (or such other period as may be fixed by mutual agree-

ment) by a contractor or subcontractor under contracts with the Departments and subcontracts, and not separately with respect to amounts received or accrued under separate contracts with the Departments or subcontracts, except that the Board may exercise such powers separately with respect to amounts received or accrued by the contractor or subcontractor under any one or more separate contracts with the Departments or subcontracts at the request of the contractor or subcontractor. Whenever the Board makes a determination with respect to the amount of excessive profits, whether such determination is made by order or is embodied in an agreement with the contractor or subcontractor, it shall, at the request of the contractor or subcontractor, as the case may be, prepare and furnish such contractor or subcontractor with a statement of such determination, of the facts used as a basis therefor, and of its reasons for such determination. Such statement shall not be used in The Tax Court of the United States as proof of the facts or conclusions stated therein.

"(d) (1) There is hereby created a War Contracts Price Adjustment Board (in this section called the 'Board'), which shall consist of six members. . . .

"(4) The Board may delegate in whole or in part any power, function, or duty to the Secretary of a Department, and any power, function, or duty so delegated may be delegated in whole or in part by the Secretary to such officers or agencies of the United States as he may designate, and he may authorize successive redelegations of such powers, functions, and duties.

"(e) (1) Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c) (1), file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less

than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. . . .

"(2) Any contractor or subcontractor . . . aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July 1, 1943, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of the enactment of the Revenue Act of 1943, file a petition with The Tax Court of the United States for a redetermination thereof, and any such contractor or subcontractor aggrieved by a determination of the Secretary made on or after the date of the enactment of the Revenue Act of 1943, with respect to any such fiscal year, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of such determination, file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have the same jurisdiction, powers, and duties, and the proceeding shall be subject to the same provisions, as in the case of a petition filed with the court under paragraph (1), except that the amendments made to this section by the Revenue Act of 1943 which are not made applicable as of April 28, 1942, or to fiscal years ending before July 1, 1943, shall not apply.

"(l) This section may be cited as the 'Renegotiation Act'."

"(d) [SEC. 701.] EFFECTIVE DATE.—The amendments made by subsection (b) shall be effective only with respect to the fiscal years ending after June 30, 1943, except that (1) the amendments inserting subsections (a) (4) (C), (a) (4) (D), (i) (1) (C), (i) (1) (D), (i) (1) (F), (i) (3), and (l) in section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, shall be effective as if such amendments and subsections had been a part of section 403 of such Act on the date of its enactment, and (2) the amendments adding subsection (d) and (e) (2) to section 403 of such Act shall be effective from the date of the enactment of this Act. 58 Stat. 78.

# SUPREME COURT OF THE UNITED STATES

No. 105.—October Term, 1947.

Jacob Lichter and Jennie L. Lichter, Individually and as Co-Partners Doing Business as Southern Fireproofing Company, a Co-Partnership, Petitioners,

*v.*

The United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[June 14, 1948.]

Mr. Justice Douglas dissenting in part.

The business here involved relates to profits realized during the fiscal year ending December 31, 1942. As to the amounts owed under these contracts, petitioners are entitled to a hearing in the District Court. For Congress did not require that class of contracts to be taken to the Tax Court. I think a close reading of the statutes, contained in Appendix III to the Court's opinion, will bear me out.

Section 403 (e) (1) relates to orders of the Board and provides that they may be reviewed by the Tax Court. And § 403 (c) (1) provides that in the absence of the filing of such a petition with the Tax Court, the orders of the Board "shall be final and conclusive."

But we are concerned here not with orders of the Board but with an order of the Secretary. Section 403 (e) (2) provides that those orders, too, may be taken to the Tax Court. But § 403 (e) (2) by its terms makes inapplicable those provisions of the 1943 amendment which are not made applicable as of April 28, 1942, or to the fiscal years ending before July 1, 1943. Thus, § 403 (c) (6) limits subsection (c) "to all contracts and subcontracts to the extent of amounts received or accrued thereunder in any

fiscal year ending after June 30, 1943, whether such contracts or subcontracts were made on, prior to, or after the date of the enactment of the Revenue Act of 1943." Hence it is clear that the provision of § 403 (c) (1) which makes the orders of the Board final and conclusive in absence of the filing of a petition with the Tax Court is not applicable here. Orders of the Secretary, at least as respects 1942 business, are therefore treated differently than orders of the Board. I conclude that the purpose was to leave contracts and contractors who fell in that category with the right of access to the courts which they had enjoyed prior to the Revenue Act of 1943. In those cases jurisdiction of the Tax Court may be invoked at the option of the petitioners.

*Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540, is not opposed to this conclusion. For that case involved an order of the Board. *Wade* v. *Simson*, 331 U. S. 793, involved an order of the Secretary and related to 1942 business. But the question in issue here was not raised there, as it is not in *Alexander Wool Combing Co.* v. *United States*, decided this day.